90-59

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

STEWART CASKIE,
Petitioner,

VS.

GLENN R. HECHINGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Under the Limitation of Liability Act, 46 U.S.C. section 181 et seq., a shipowner faced with liability for an accident may file a petition in federal district court for exoneration from liability or limitation of liability to the value of the ship itself. The court, upon obtaining control of the ship or the value of the ship from the petitioner, may enjoin all claimants from maintaining separate suits and require them to file all of their claims in the limitation proceeding. All matters are then tried to the court, not a jury, to determine whether the shipowner is liable to any of the claimants and, if so, whether the shipowner's liability is limited under the Act to the value of the ship. When a district court assumes jurisdiction under the Act, a Jones Act seamen (such as petitioner was) thereby loses his rights to file suit against the shipowner in state court or to trial by jury in federal court — rights which he would otherwise have in prosecuting an action for personal injuries under the Jones Act or general maritime law.

The Act was originally enacted in 1851, in order to encourage shipping and commercial maritime activity, and to make American shipping interests competitive with those of foreign maritime nations. Although the Act initially applied only to commercial vessels, two amendments thereto — in 1886 and 1936 — were interpreted by the lower federal courts as extending the Act to all types of pleasure craft as well. As a result, owners and insurers of small pleasure boats are able to limit their liability under the Act to the value of the boat itself, regardless of how small that amount may be, or how great the damages suffered by persons injured or killed in boating accidents. The question presented is:

Whether the Limitation of Liability Act extends to pleasure craft, even though:

1. The Act was initially enacted in 1851 to protect American shipping and other maritime interests of a commercial nature.

2. In enacting the two material amendments thereto, Congress never once addressed the question of whether the Act ought to be extended to pleasure craft.

3. Extension of the Act to pleasure craft was effected early in the century, and has since been maintained, by essentially unreasoned judicial decisions which make little attempt at discerning legislative intent or engaging in statutory construction, but are based instead almost entirely upon the literal language of the statute.

4. During the past quarter century, extension of the Act to pleasure craft has been consistently and severely denounced by virtually every judge and commentator who has considered the matter, as unfair, irrational, and unrelated to the essential purposes of the Act.

5. At least eight district court opinions have, during the past six years, held that the Act does *not* extend to pleasure craft; and have issued opinions which are thoughtful and well reasoned, which consider both legislative history and statutory construction, and which reach an equitable and sensible result.

6. All of the courts of appeals which have ruled on the matter have upheld the extension, albeit in opinions which are essentially unreasoned; rely almost entirely upon the literal language of the statute; and are often apologetic for the inequitable results reached, but profess to be bound by prior circuit precedent or by two decisions of this Court.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Stewart Caskie, and the respondent, Glenn R. Hechinger.

TABLE OF CONTENTS

	Page
Question Presented	i
List Of Parties	iii
Table Of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	4
This Court Should Finally Consider, And Strike Down As Inequitable, Irrational, And Unnecesary, The Judicial Extension Of The Statutory Limitation Of Liability To The Owners Of Pleasure Boats	4
A. Extension Of The Limitation Of Liability Act To Pleasure Boat Owners Is Unfair, Irrational, And Unsupported By The Purpose Of The Legislation	7
B. The Judicial Expansion Of The Limitation, Based Upon A Literal Reading Of Amendments To The Act, Was Unnecessary And Indeed Contrary To Fundamental Canons Of Statutory Construction	9
C. The Unusual And Unfortunate Conflict Between the Circuit And District Courts—In A Matter Of Ever Increasing Importance—Deserves To Be Resolved By This Court	13
Conclusion	16
Appendix A (Opinion Of The Court Of Appeals For The Ninth Circuit)	
Appendix B (Opinion Of The District Court For The Northern District Of California)	
Appendix C (Order Of The Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing And Suggestion For Rehearing En Banc)	

TABLE OF AUTHORITIES

Cases

Page

Baldassano v. Larsen, 580 F.Supp. 415 (D. Minn. 1984) 9, 13, 14

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 11

Complaint of Keys Jet Ski, Inc., 714 F.Supp. 1057 (S.D. Fla. 1989) 13, 14

Complaint of Myers, 721 F.Supp. 39 (W.D.N.Y. 1989) ... 13

Complaint of Shaw, 668 F.Supp. 524 (S.D.W.Va. 1987) *rev'd* 1989 AMC 116 (4th Cir. 1989) 13, 14, 15

Complaint of Tracey, 608 F.Supp. 263 (D. Mass. 1985) ..... *passim*

Coryell v. Phipps (The Seminole), 317 U.S. 406 (1943) .. 15

Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234 (9th Cir. 1989) 5, 6, 7

Estate of Lewis, 683 F.Supp. 217 (N.D. Cal. 1987) 8, 13

Evansville Co. v. Chero Cola Co., 271 U.S. 19 (1926) 12

Feige v. Hurley, 89 F.2d 575 (6th Cir. 1937) 14

Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975) 8

Griffin v. Oceanic Contractors Inc., 458 U.S. 564 (1982) ... 12

In re Young, 872 F.2d 176 (6th Cir. 1989) 14

Just v. Chambers, 312 U.S. 383 (1941) 15

Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225 (11th Cir. 1990) .. 13

Lindgren v. United States, 281 U.S. 38 (1930) 3

The Mamie, 5 Fed. 813 (E.D. Mich. 1881) *aff'd.* 8 Fed. 367 (C.C.E.D. Mich. 1881) 5

Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) .. 8

Matter of Hechinger, 890 F.2d 202 (9th Cir. 1988) 14

Matter of Lowing, 635 F.Supp. 520 (W.D. Mich. 1986) ..... *passim*

Matter of Sisson, 668 F.Supp. (N.D. Ill. 1987) *aff'd* 867 F.2d 341 (7th Cir. 1989) 13

Muniz v. Hoffman, 422 U.S. 454 (1975) 11

TABLE OF AUTHORITIES

CASES

Page

Norwich v. Wright, 80 U.S. (13 Wall.) 104 (1859) 5

Offshore Logistics v. Tallentire, 477 U.S. 207 (1986) 11

Petition of Porter, 272 F.Supp. 282 (S.D. Tex. 1967) 8

Richards v. Blake Builders Supply Inc., 528 F.2d 745 (4th Cir. 1975) 8, 15

United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952) 15

United States v. Morton, 467 U.S. 822 (1984) 11

Watt v. Alaska, 451 U.S. 259 (1981) 11

Statutes

28 U.S.C. section 1254(1) 2

46 U.S.C. section 181 2

46 U.S.C. section 183 ..... 2, 6, 10

46 U.S.C. section 188 2

46 U.S.C. section 688 3

Miscellaneous

Eyer, *Shipowner's Limitation Of Liability—New Directions For An Old Doctrine*, 16 Stan. L. Rev. 370 (1964) 5, 7, 8

Gilmore & Black, *The Law of Admiralty* 5, 7

Harolds, *Limitation of Liability and Its Application to Pleasure Boats*, 37 Temple L.Q. 423 (1964) 9, 15

Stern, Gressman & Shapiro, *Supreme Court Practice* (1986) 13, 15

Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L. Rev. 661 (1963) 5, 6, 9, 12

United States Coast Guard, *Boating Statistics* (1988) 13

Walton, *Pleasure Boat Owner Tort Liability In Admiralty*, 50 So. Cal. L. Rev. 549 (1977) ..... *passim*

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The petitioner Stewart Caskie respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 27, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 890 F.2d 202, and is reproduced in Appendix A hereto.

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of California (Orrick, D.J.) are reported at 1988 AMC 2857, and are reproduced in Appendix B hereto.

JURISDICTION

Invoking jurisdiction under 46 U.S.C. Section 181 et seq. (the Limitation of Liability Act), respondent brought this suit in the Northern District of California. On March 6, 1988, judgement was entered in favor of respondent.

On petitioner's appeal, the Ninth Circuit, on November 27, 1989, entered a judgment and an opinion affirming the District Court's judgment. On March 7, 1990, the court denied petitioner's petition for rehearing and suggestion for rehearing en banc.

On May 16, 1990, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including July 5, 1990.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

46 U.S.C. Section 183(a)

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. Section 188

Except as otherwise specifically provided therein, the provisions of sections 175, 182, 183, 183b to 187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

STATEMENT OF THE CASE

"These actions arise out of the abandonment of the vessel Wynn D II near the south channel entrance to San Francisco Bay on December 2, 1985. The Wynn D II was approximately halfway through the south channel when breaking waves twenty to twenty-five feet high suddenly surrounded the vessel. The vessel, a trawler forty-nine feet in length, sought safety by turning its nose to the west, attempting to reach deeper water beyond the breaking waves. Claimant Stewart Caskie injured his back when the vessel dropped from the crest of one wave into the trough of the next, the force of the sea throwing him to the floor of the wheelhouse." 1988 AMC 2857.

The Wynn D II had been leased by Glenn R. Hechinger, and the parties stipulated that he was the "owner" of the vessel. It was a live-aboard type craft, which was not engaged in commerce. Through a yacht broker, Hechinger arranged to have the vessel delivered to him in Alameda, California, from its berth in Newport Beach, California, by a delivery skipper named Stevenson. Stevenson hired three crew members for the voyage north, including petitioner Stewart Caskie.

During the three day voyage, the ship experienced a number of different problems, including a vibration problem; a broken oil pressure gauge; a generator which quit; a malfunctioning fuel gauge; an inadequate supply of fuel; a bilge pump which quit during a fuel transfer; and the temporary loss of engine power between Monterey and San Francisco. In addition, the vessel did not have any handholds on the ceiling or walls of the wheelhouse. When the vessel encountered extremely heavy seas and high waves while approaching San Francisco Bay, Caskie was thrown to the floor of the wheelhouse and injured.

At the time of his injury Caskie was a Jones Act seaman (*see* 1988 AMC at 2865). Under the Jones Act, a seaman who suffers personal injury in the course of his employment may bring an action for damages at law, with the right of trial by jury. 46 U.S.C. section 688. Such an action may be brought in either state or federal court. *See Lindgren v. United States*, 281 U.S. 38, 40 (1930). Before Caskie filed any suit, however, Hechinger filed his

own action in federal court and "the district court assumed jurisdiction of this case under the Limitation of Liability Act (the 'Act') . . . ." 890 F.2d at 206.

Under the Act, a limitation action is tried to the court, not to a jury. At trial, Caskie claimed that the ship was unseaworthy, that there had been active negligence by the owner and skipper of the vessel, and that Caskie's injuries were a proximate result thereof. However, the "district court concluded that, because the vessel was safe and seaworthy, and no negligence existed on the part of Hechinger or Stevenson and the Wynn D II crew, the cause of the accident was an Act of God or peril of the sea." 890 F.2d at 209. The court also enjoined Caskie from bringing a separate action for redress of his injuries.

Caskie appealed. Among other things, he asserted that the Limitation of Liability Act does not apply to pleasure craft such as the Wynn D II (*see* appellant's opening brief pp. 16-26). Hence he asked the court for an order declaring the Act inapplicable and dissolving the lower court's injunction, "thereby vindicating his right to pursue compensation for his injuries in his chosen forum." *Id.* at 26. He also appealed on the merits.

The Court of Appeals affirmed. See 890 F.2d 202. It held, *inter alia*, "that the limitation provision applies to pleasure boats, and that the district court had jurisdiction to hear this case." *Id.* at 206. Finding also that the district court's findings of fact were not clearly erroneous, it affirmed the judgement below.

Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on March 7, 1990.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD FINALLY CONSIDER, AND STRIKE DOWN AS INEQUITABLE, IRRATIONAL, AND UNNECESSARY, THE JUDICIAL EXTENSION OF THE STATUTORY LIMITATION OF LIABILITY TO THE OWNERS OF PLEASURE BOATS

The Limitation of Liability of Act, first enacted in 1851, "has been pilloried by commentators as one of Congress' least distin-

guished pieces of legislation." Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L. Rev. 661, 707 n. 1 (1963), and accompanying text (hereinafter "Stolz"), citing to Gilmore & Black, *The Law of Admiralty*, p. 676 (1957 ed.) ("No doubt when more obscure statutes are drafted, Congress will draft them, but it is difficult to believe that any future body of lawmakers will ever surpass this extraordinary effort"). "Misshapen from the start, the subject of later encrustations, arthritic with age, the Limitations Act has 'provided the setting for judicial lawmaking seldom equalled.' " *Esta Later Charters, Inc. v. Ignacio*, 875 F. 2d 234, 239 (9th Cir. 1989), quoting Eyer, *Shipowner's Limitation Of Liability—New Directions For An Old Doctrine*, 16 Stan. L. Rev. 370, 374 (1964) (hereinafter "Eyer"). One specific piece of judicial lawmaking--the needless extension of the Act to the owners and insurers of pleasure boats—has recently come under severe attack in the lower courts, and it is that extension which is the subject of the instant petition.

The Act's initial enactment in 1851 was designed to protect the commercial shipowner, due to the high risk involved in commercial shipping at that time and the absence of control by an owner or investor once a ship had left port. See, e.g., *Complaint of Tracey*, 608 F.Supp. 263, 266 (D.Mass. 1985). "Leaving the United States shipowner without protection would put him at a competitive disadvantage in the world shipping market." *Id.* at 266, and authorities cited. Commentators, courts, and the congressional history of the Act are all in accord that "the Act's purpose was to encourage ship building and place the American merchant marine on an equal footing with those of England and the other maritime nations of Europe, where shipowners had benefited from various systems of limitation for many years." *Id.* at 266, citing *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 124 (1859); and see *The Mamie*, 5 Fed. 813 (E.D. Mich. 1881), *aff'd.* 8 Fed. 367 (C.C.E.D. Mich. 1881) (refusal to extend Act to pleasure boat "not engaged in what is ordinarily understood as maritime commerce"). See also *Matter of Lowing*, 635 F. Supp. 520, 522- 523 (W.D. Mich. 1986); Walton, *Pleasure Boat Owner Tort Liability In Admiralty*, 50 So. Cal. L. Rev. 549, 572-574 (1977) (hereinafter "Walton"); Eyer, supra, 16 Stan. L. Rev. at 370-375.

Despite its undeniably commercial origins, a series of essentially unconsidered judicial decisions — reached during the early part of this century — extended the limitation of liability to the owners of pleasure boats. This extension, however, occurred without any explicit consideration of the issue by Congress or any thoughtful analysis or statutory construction by the courts. Later cases cited earlier cases, much as elephants following each other in a circus procession, until the issue became one controlled by cut and dried precedent.

As a result of the extension, the liability of the owner (and insurer) of every pleasure boat is limited to the value of the boat following any accident in which it is involved. *See* 46 U.S.C. section 183(a). That result frequently produces "an absurdly small amount compared to the damages suffered by the claimants." *Esta Later Charters, Inc.*, supra, 875 F.2d at 238; *accord:* Stolz, supra, 51 Cal. L. Rev. at 706 n. 190 ("a striking disparity between the value of the vessel and the amount of claims is characteristic of pleasure boat limitations cases"). Beyond this unfair limitation upon recovery by injured claimants (and the corresponding windfall subsidy to pleasure boat owners and insurers), the result of the extension has been severely criticized as being entirely irrational and as having no relation to—indeed, as being a perversion of—the original commercial purpose in limiting the liability of commercial shipowners.

During the past six years, a firestorm of protest has swept through the district courts of this country. In many well reasoned opinions—several of which include a thoughtful job of statutory interpretation—they have concluded that the Limitation Act should not and does not apply to pleasure boats. Several such decisions were issued in open defiance of contrary circuit rulings. By contrast, virtually all of the opinions issued by the Courts of Appeals—which opt *for* extension of the Act to pleasure boats—are characterized by (1) blind adherence to precedent, (2) a resolute refusal to engage in meaningful statutory construction, and (3) an apologetic acknowledgment that the result reached is indeed irrational and unfair. Yet, as we will show, this Court has never spoken on the issue.

In the following pages, petitioner will make three points. *First,* we summarize the main criticisms leveled at the extension of the limitation to pleasure boats by the courts and commentators. *Second,* we briefly describe how the extension was effected by the judiciary, and why the extension violates well settled canons of statutory construction. *Third,* we document the sharp conflict between the district and the circuit courts, and the striking disparity in the quality of their respective opinions. Given the sharp annual rise in pleasure boat accidents and fatalities, and the litigation arising therefrom, petitioner submits that this Court ought to accept this issue for plenary consideration.

A. Extension Of The Limitation Of Liability Act To Pleasure Boat Owners Is Unfair, Irrational, And Unsupported By The Purpose Of The Legislation.

"Application of the Act to pleasure craft is unfair, inefficient, and unjustified by the purposes of limitation." Walton, supra, 50 So. Cal. L. Rev. at 560. And the unfairness becomes particularly striking when the post-accident value of the pleasure boat, and thus the potential liability of the owner, is low, and the harm to the innocent victim is high, as in the case of loss of life. The situation is so obviously unjust that professors Gilmore and Black, in their treatise on admiralty law, have written:

> No theory can justify the results reached . . . under which the owner of yacht or speedboat, who is provident enough to hire someone else to run the boat for him, is granted a general license to kill and destroy.

Tracey, supra, 608 F.Supp. at 268, quoting Gilmore & Black, *The Law of Admiralty* (1975 ed.), p. 882. Others have attacked the limitation as not only a subsidy to the maritime industry, but "an unusual subsidy because it is incurred, not by the treasury, but rather by fortuitously selected shippers, passengers and crew members." Eyer, *supra,* 16 Stan. L. Rev. at 389. In this fashion, the "Limitation Act provides shipowners a generous measure of protection not available to any other enterprise in our society." *Esta Later Charters, Inc.*, supra, 875 F.2d at 239. And it "may well be that the greatest beneficiaries under the Act today are not, as was intended, the ship builders and owners, but rather insur-

ance companies who are able to collect full premiums while limiting their liability to the value of the vessels." *Petition of Porter*, 272 F.Supp. 282, 285 (S.D. Tex. 1967).

But if extension of the Act is unjust, it is also irrational. Courts and commentators alike have observed that "[m]any of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail." *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437 (Black, J., dissenting for four members of the Court); *accord*: Eyer, supra, 16 Stan. L. Rev. at 389 (detailing the economic and social changes "which have contributed to its [the limitation's] obsolescence"). In short, "it is not clear that the original rationale for the Act obtains today, *even for commercial shippers*." Tracey, supra, 608 F.Supp. at 269 (emphasis supplied).

But commercial shipping aside, the undeniable fact is that no responsible commentator, or court for that matter, has really attempted to justify extension of the limitation to pleasure boating. Instead, all agree that "there is *no* rational basis for application of the Act to pleasure boats." *Tracey*, supra, 608 F.Supp. at 269 (emphasis supplied); see also, e.g., *Estate of Lewis*, 683 F.Supp. 217, 220 (N.D. Cal. 1987) ("there are *no* policy reasons or equitable considerations which warrant extension of the Act") (emphasis supplied); Walton, supra, 50 So. Cal. L. Rev. at 582 (after reviewing possible justifications, author concludes that "there is no rational basis for continued application of the Act to pleasure craft"). Particularly instructive for present purposes is the fact that several courts which have considered themselves precedentially bound to extension of the Act have concluded that they also "can perceive no reason to extend that protection to the relatively affluent owners of pleasure boats and their insurers at the expense of those injured or killed and their families." *Richards v. Blake Builders Supply Inc.* 528 F.2d 745, 748 (4th Cir. 1975); *Gibboney v. Wright*, 517 F.2d 1054, 1057 (5th Cir. 1975).

Besides being unjust and irrational, extension of the limitation principle to pleasure boating causes other forms of substantial harm, including increased costs of litigation and an unfair litigation advantage to boat owners. See generally Walton, supra, 50 So. Cal. L. Rev. at 560-582 ("The Problems Created by

Application of the Act to Pleasure Craft"). Attacked by many and defended by none, the limitation lives on as if attached to a life maintenance machine, "contrary to common sense, fundamental fairness, and the spirit of the Act." *Tracey*, supra, 608 F.Supp. at 267. We therefore consider briefly, in the next subsection, how the extension came about, and why it is properly amenable to judicial reversal by this Court.

B. The Judicial Expansion Of The Limitation, Based Upon A Literal Reading Of Amendments To The Act, Was Unnecessary And Indeed Contrary To Fundamental Canons Of Statutory Construction.

As will be discussed, the judicial extension of the Limitation Act to pleasure boats was based upon two Congressional amendments thereto — in 1886 and 1936. But it is undisputed that "there is nothing in the Congressional Record to indicate that the limitation of liability was ever intended to protect owners of pleasure craft or their insurers." Harolds, *Limitation of Liability and Its Application to Pleasure Boats*, 37 Temple L.Q. 423, 428 (1964); *accord:* Walton, supra, 50 So. Cal. L. Rev. at 575 n. 125, and accompanying text ("the actual intention of Congress in thus amending the act is obscure"); *id.* at 580 n. 150 and accompanying text ("Congress has expressed no sentiments regarding application of the Act to pleasure craft"); Stolz, supra, 51 Cal. L. Rev. at 708 and n. 197. "Like the courts in *Tracey* and *Baldassano*, this Court finds that the historical extension of the Act to pleasure boats occurred without Congressional approval and allows for unjust and unnecessary repercussions." *Matter of Lowing*, supra, 635 F.Supp. at 527-528 and n. 8.

Although space constraints preclude a detailed explication of the course of judicial decisions during the early part of the century, the bottom line is that the earliest reported cases seized on the term "any vessel," added by the 1886 amendment, to conclude that pleasure boats were to be included; and very shortly thereafter, subsequent decisions began to cast the early ones as precedents to be followed. "This surprising expansion of the Act, incredibly, occurred with virtually no discussion." *Baldassano v. Larsen*, 580 F.Supp. 415, 417 (D. Minn. 1984); *accord: Lowing*, supra, 635 F.Supp. at 523 ("for reasons which scholars have

found inexplicable, district courts by the 1920's were able to point definitively to precedent supporting the extension of the Liability Act to pleasure craft"). Since it was "the judiciary [which] extended the Act to cover pleasure boat accidents and this extension has neither been codified nor statutorily recognized . . . [j]udicial reversal of this coverage is therefore both feasible and proper." Walton, supra, 50 So. Cal. L. Rev. at 583-584.

The 1886 amendment extended the Act's application to "all sea-going vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges and lighters." See *Tracey*, supra, 608 F.Supp. at 267. "One might reasonably have concluded that, due to this change, the Act now covered all commercial vessels; even those engaged in local activities." *Id.*, at 268. Instead, the courts utilized that language to apply limitation of liability to pleasure craft, "even though the 1886 Amendment did not mention non-commercial boats and the statute continued to provide that an owner could limit his liability to his interest in the vessel 'and her freight then pending'". *Id.*, at 268; *accord: Lowing*, supra, 635 F.Supp. at 523 ("A literal reading of the 1886 Amendment dictates a holding that it was intended to extend the Limitation Act to vessels used for inland and coastal navigation, but only to commercial vessels"); *id.* at 523-524 (arguing that the contrary assumptions in earlier cases were unsound).

In a 1936 amendment to section 183, Congress specifically excluded pleasure craft from certain subdivisions thereof, permitting some courts to infer that "Congress intended to include pleasure boats in the core of the Act, §183(a)." *Tracey*, supra, 608 F.Supp. at 268. But at least two district courts have concluded that there was nothing in the congressional history which evidenced such an intent by Congress. *Id.* at 268; *Lowing*, supra, 635 F.Supp. at 524. *Lowing* also said that the use of a permissive "may" in section 183(f) indicates that "the judiciary *may* in its discretion decide to include or exclude pleasure craft from the act." *Id.* at 524 (emphasis in original); *accord:* Walton, supra, 50 So. Cal. L. Rev. at 578-579 (view that 1936 amendment disclosed congressional intent to include pleasure boats within the ambit of Section 183(a) is "unwarranted, on at least two grounds").

At the risk of over simplifying the situation, but not by much, extension to pleasure boats of the 1851 Act — which was concededly limited to commercial vessels — rests upon (1) the 1886 amendment's reference to all "sea-going vessels"; (2) the 1936 amendment, which by excluding "pleasure yachts" from certain subdivisions of section 183 impliedly included them in Section 183(a); and (3) the 1947 enactment of 1 U.S.C. section 3, which defined "vessel" in all-inclusive terms. (Title 1, Section 3 was intended to "codify and enact into positive law the various provisions of laws contained in Title 1 of the United States Code on January 3, 1947." U.S. Congressional Service, House Committee of the Judiciary, House Report No. 251, April 14, 1947, at 1511.) Yet in relying upon the literal meaning of those phrases, the courts upholding the application of the Limitation Act to pleasure boating have simply eschewed any attempt at serious statutory construction.

This Court, however, has frequently utilized statutory language as the beginning, rather than the end, of its inquiry into legislative intent. For example, in *Offshore Logistics v. Tallentire*, 477 U.S. 207, 221 (1986), the Court said that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the purposes of the whole law, and to its object and policy." *Accord: United States v. Morton*, 467 U.S. 822, 828 (1984) ("we do not, however, consider statutory phrases in isolation; we read statutes as a whole").

Moreover, the Court's main purpose in going behind the literal meaning of the statutory language is, of course, to give life to the legislative intent with respect to the statute as whole. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). "The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Watt v. Alaska*, 451 U.S. 259, 266 (1981). In addition, it "will not be inferred that the legislature, in revising and codifying the laws, intended to change their policy unless such an intention be clearly expressed." *Muniz v. Hoffman*, 422 U.S. 454, 470 (1975). And it will avoid an "interpretation of a statute which would produce absurd results . . . if alternative interpretations consistent with the legislative

purpose are available." *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 575 (1982).

Interestingly enough, Professor Stolz has shown that in the early years the Court liberally construed and augmented the Act in order to fill in gaps and to "solve puzzles." *Stolz*, supra, 51 Cal.L.Rev. at 709-710. "The Court, in other words, made the Limitation Act workable by disregarding its language where necessary and by supplementing it where needed." *Id.* at 710; see also *id.* at 710 n. 206 ("The court has evolved several doctrines that confine the scope of limitation under the Act without substantial aid from the statutory language"). Professor Stolz also points out that "the very word 'vessel' in the 1886 amendment was considered by the Supreme Court ... and was refused a literal interpretation. The Court held that a wharfboat was not a 'vessel' for purposes of the Limitation Act because a grant of limitation would not further the purpose of the statute 'to promote the building of ships, to encourage the business of navigation, and in that respect put this country on the same footing with other countries'." *Id.* at 701-711, citing to *Evansville Co. v. Chero Cola Co.*, 271 U.S. 19, 21 (1926).

In short, the extension of the Limitation Act to pleasure boats was accomplished by the judiciary, in a series of cursory, unreasoned opinions, whose holdings were based upon the literal language of two amendments; were contrary to the whole purpose of the Limitation Act; found no support in the legislative history of the amendments; and produced a result so unjust and irrational as to be condemned by the very courts which today believe themselves to have no choice but to perpetuate the injustice. Meanwhile, the only sensible attempts to engage in statutory construction, to discern legislative intent, and to reach a just result, are being made by the very courts which lack the power to effectuate even the most sensible result in the face of contrary circuit precedent. Under these circumstances, this Court should step in and put things right.

C. The Unusual And Unfortunate Conflict Between the Circuit And District Courts—In A Matter Of Ever Increasing Importance—Deserves To Be Resolved By This Court.

During the past six years, at least eight different district courts have held that the Limitation of Liability Act does *not* apply to pleasure boats. See *Baldassano v. Larson*, supra; *Complaint of Tracey*, supra; *Matter of Lowing*, supra; *Complaint of Shaw*, 668 F.Supp. 524 (S.D.W. Va. 1987), *rev'd* 1989 AMC 116 (unpublished); *Matter of Sisson*, 668 F.Supp. 1196 (N.D.Ill. 1987), *aff'd on other grounds*, 867 F.2d 341 (7th Cir. 1989); *Estate of Lewis*, 683 F.Supp. 217 (N.D.Cal. 1987); *Complaint of Keys Jet Ski, Inc.*, 714 F.Supp. 1057 (S.D.Fla. 1989), *rev'd* 893 F.2d 1225 (11th Cir. 1990); *Complaint of Myers*, 721 F.Supp. 39 (W.D.N.Y. 1989). Yet "[a]ll reported circuit court decisions apply the Limitation to pleasure craft." *Keys Jet Ski, Inc. v. Kays*, supra, 893 F.2d at 1229, and cases cited; see also *id.* at 1229 (list of district court cases applying limitation, which the court rather plainly mischaracterizes as "the vast majority of district court cases"). Ordinarily, of course, a conflict between the circuit and district courts does not constitute the sort of conflict which prompts this Court to grant review — although it has sometimes cited such conflicts as having relevance in the certiorari context. See Stern, Gressman & Shapiro, *Supreme Court Practice* (1986 ed.), pp. 207-209.

Petitioner submits, however, that several aspects of this particular conflict are sufficiently unusual and significant to compel a different conclusion. We briefly discuss five of those factors for the Court's consideration.

1. The rash of district court holdings is of very recent origin; has occurred all across the country; and coincides with a sharp and ongoing increase in the number of pleasure boat accidents and fatalities and, presumably, lawsuits arising therefrom. *See* United States Coast Guard, *Boating Statistics* (1988), pp. 7, 11, 14 (17.3 million pleasure boats, up from 6 million in 1963 when Professor Stolz wrote his article; 6,718 boating accidents, including 946 fatalities, and 3,476 injuries; $24.3 million in property damage; 8,981 vessels involved in accidents).

2. In three or four cases, the district courts have reluctantly ruled in the teeth of contrary circuit precedent. See *Baldassano*, supra, 580 F.Supp. at 419-420 ("the court is not unmindful of the fact that this opinion is precedent-breaking"); *Lowing*, supra, 635 F.Supp. at 526 (finds its circuit's contrary decision in *Feige* to be "not well grounded"); *id.* at 528 (court acknowledges that its determination "contravenes the majority of the available precedents"); *Shaw*, supra, 668 F.Supp. at 526 (court's reasoning is contrary to *Richards;* but court convinced "that the appellate court, were it given the opportunity, would recognize the recent trend and would abandon that precedent"), *rev'd* 1989 AMC 116 (4th Cir. 1989); *Keys Jet Ski*, supra, 704 F.Supp. at 1058-1059 (views Fifth and Eleventh Circuit cases as not binding), *rev'd* 893 F.2d 1225 (11th Circuit 1990). Although the Court may deplore such a development, it should not overlook the source, *viz.*, a shared perception of a situation that "cries out for remedial adjudication," and a conviction that the courts "cannot ignore the fundamental unfairness of the law as it exists." *Baldassano*, supra, 580 F.Supp. at 420. Moreover, most of the district court opinions are well reasoned; engage in thoughtful statutory construction; and reach a sensible and fair result.

3. In sharp contrast, the Court of Appeals opinions are remarkable for (1) their unreasoned character, (2) an unthinking reliance upon equally unreasoned "precedent," and (3) a failure to look to Congressional intent or to engage in statutory construction. An excellent example is the link chain formed by *Feige v. Hurley*, 89 F.2d 575, 576 (6th Cir. 1937), which decided the entire issue in a single sentence; In *re Young*, 872 F.2d 176, 177 (6th Cir. 1989), which—over fifty years later, without independent analysis—found itself "compelled to follow *Feige*"; and by the case at bench, in which the Ninth Circuit found "the *reasoning* in *Young* persuasive." *Matter of Hechinger*, 890 F.2d 202, 206 (9th Cir. 1988) (emphasis supplied).

4. No Court of Appeals opinion makes any real effort to justify the result reached by extending the limitation of liability to pleasure boats. To the contrary, virtually every one of them either deplores the outcome or at least acknowledges that it runs counter

to common sense, sound public policy, and the weight of critical opinion.

5. Most commentators and courts agree that this Court has never addressed or decided the issue, even though it did apply the Act to pleasure boats in one or two cases. See, e.g., Walton, supra, 50 So. Cal. L. Rev. at 584, n. 165; Harolds, supra, 37 Temple L.Q. at 429-430; *Tracey*, supra, 608 F.Supp. at 263; *Lowing*, supra, 635 F.Supp. at 520, discussing *Coryell vs. Phipps* (The Seminole), 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941). Yet two Courts of Appeals view *Coryell* and *Just* as actually having settled the matter. See *Shaw*, supra, 1989 AMC at 117 ("we are bound to follow the United States Supreme Court's *holding* in *Coryell* . . . that a yacht owner would be protected by the Limitation of Liability Act") (emphasis supplied); *Richards v. Blake Builders Supply, Inc.*, supra, 528 F.2d at 748-749 (reading *Just* and *Coryell* as foreclosing the limitation of liability issue in the lower courts). Although these decisions are almost surely wrong, *cf. United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952) (a case is not binding precedent on a point not discussed in the court's opinion), they demonstrate the effect which this Court's continuing silence can have on the matter.

As Stern & Gressman put it, "the importance of an issue for certiorari purposes can sometimes be identified by the degree of diverse and conflicting views that lower courts, as well as commentators, have expressed. The conflicting views of district courts ordinarily add to the confusion, thus making it proper for counsel to bring such lower court decisions to the Court's attention." Stern, Gressman & Shapiro, supra, p. 207. Petitioner respectfully submits that, in light of the foregoing conflicts and confusion, prompt intervention by this Court would be exceedingly appropriate.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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July 3, 1990

(Appendices follows)

Appendix A

IN THE MATTER OF THE COMPLAINT OF GLENN R. HECHINGER, AS CHARTERER AND OWNER *PRO HAC VICE* OF THE TRAWLER *WYNN D II*, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

GLENN R. HECHINGER, *Plaintiff-Appellee*

v.

STEWART CASKIE, *Defendant-Appellant*

United States Court of Appeals, Ninth Circuit,
November 27, 1989
No. 88-2525

Before: Norris, Beezer and Brunetti, Ct.JJ,

LIMITATION OF SHIPOWNER'S LIABILITY — 12, Losses to Which Applicable — YACHTS — 19. Limitation of Liability.

Pleasure boat owners are entitled to invoke the benefits of the Limitation of Liability Act (following Sixth Circuit's decision in *In re Young*, 1989 AMC 1217),

LIMITATION OF SHIPOWNER'S LIABILITY — 121. Seaworthiness, Due Diligence of Owner — PERSONAL INJURY — 17212. Injury by Wave or Weather.

District court properly exonerated pleasure boat owner from liability to injured crewman when the boat swamped while entering San Francisco Bay due to sea conditions constituting an Act of God or sea peril. The boat was seaworthy and the owner was not negligent.

Reported also at 890 F.2d 202

1988 AMC 2857 affirmed.

Lyle C. Cavin, Jr., *for Defendant-Appellant*
Terence S. Cox (Derby, Cook, Quinby & Tweedt) *for Plaintiff-Appellee*

Appeal from the United States Court for the Northern District of California, William H. Orrick, D.J., 1988 AMC 2857, Affirmed.

MELVIN T. BRUNETTI, CT.J.:

I. OVERVIEW

Appellant, Stewart Caskie, appeals the district court's ruling in favor of appellee, Glenn R. Hechinger. Appellee, owner *pro hac vice* of the vessel *Wynn D II*, petitioned for exoneration from or limitation of liability under the Limitations of Liability Act (46 U.S.C.App. § 183) for injuries caused when high breaking waves suddenly surrounded his vessel, and ultimately caused it to sink. Appellant suffered back injuries when the force of the sea threw him to the floor of the wheelhouse and he sought compensation under the Jones Act (46 U.S.C.App. § 688) for negligence and under general maritime law for unseaworthiness. The district court found for Hechinger and we affirm, holding that the proximate cause of the injuries was an Act of God or peril of the sea.

Statement of Facts

The district court made findings of fact in its Memorandum of March 6, 1988, 1988 AMC 2857. These findings of fact shall not be set aside unless clearly erroneous, and we give due regard to the district court's opportunity to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a); *Wood v. Sunn*, 852 F.2d 1205, 1208 (9 Cir. 1988); see also *Brophy v. Lavigne*, 1987 AMC 900, 904, 801 F.2d 521, 524 (1 Cir. 1986) (Where credibility determinations are clearly explained, and the factual decisions are supported by the record, court of appeals must uphold trial court's judgment). The following is a summary of the district court's 58 factual findings.

The *Wynn D II*, a forty-nine foot trawler, was donated to the Boy Scouts of America in September 1985. In August, Robert Shadbolt & Associates surveyed the *Wynn D II* out of the water,

finding the vessel to be fit and seaworthy, pending minor repairs which were made.

Hechinger, looking to buy a large wooden motor boat, contacted Ken Underwood, a yacht broker for the past twenty-eight years and principal of Edgewater Yachts Brokerage in Sausalito, California. They had a common interest in classic wooden boats and had known each other for some time. The Boy Scouts, past clients of Underwood, told him that the *Wynn D II* was for sale and provided Underwood with photos of the boat and the August, 1985 survey. Hechinger went to Newport Beach and spent two to three hours inspecting the vessel; then he took the vessel on a sea trial lasting over two hours. However, only one half hour was spent on ocean waters. The vessel handled well with no problems.

Hechinger agreed to lease the vessel for two years, with an option to buy, and the parties have stipulated that Hechinger is the "owner" of the vessel. As Hechinger was inexperienced at ocean-going travel, Underwood arranged to have the vessel delivered to Hechinger in Alameda. Underwood, a yacht broker for the past twenty-eight years, has often arranged for delivery of vessels.

Underwood contacted Stevenson, an experienced skipper of twenty years, who over the past twelve years has delivered at least fifty-eight vessels of varying sizes up the California coast. Underwood knew Stevenson personally and Stevenson had never suffered a casualty before the *Wynn D II*. Stevenson and Hechinger agreed that Stevenson would make all arrangements to bring the vessel up the coast, including hiring the crew, preparing the vessel for departure, deciding when to leave for Newport Beach and when to arrive in Alameda. Underwood arranged for the Boy Scouts to have the oil and fuel filters changed and the fuel tanks filled. Stevenson had asked Hechinger to advance $300 of the expense money. Hechinger mailed a check to Underwood's office, but the check did not arrive in time, so Stevenson used his own money to pay for part of the airfare of the crew, the food and supplies for the voyage, taking $60 with him. The total cost of the delivery was $500 plus expenses. After these initial arrangements were made, Hechinger had no further contact with the vessel or the crew until he learned of the abandonment outside San Francisco Bay. Stevenson learned that Underwood had arranged

for the *Girlfriend III*, a sixty foot antique motor cruiser built in 1929, to be delivered at the same time. Bruce Martens, the skipper of the *Girlfriend III*, and Stevenson arranged to travel up the coast together. Martens has lived on boats in the Bay Area his entire life and made over two hundred coastal voyages between Seattle and San Diego.

Stevenson and the crew left for Newport Beach on November 29, 1985, a Friday, and spent the rest of the day preparing for the trip. Stevenson and Caskie inspected the structural elements of the vessel, its hoses, delivery systems, navigational lights, and radio. A Boy Scout representative told Stevenson that the filters had been changed and the fuel tanks "topped off." The engine was warm and fuel could be seen near the tanks where some had spilled. The sight gauges signaled full. Stevenson was pleased that Hechinger left him to inspect the vessel himself as it was part of his normal routine. Stevenson found the vessel to be structurally fit and safe for the trip north. The crew purchased a new bilge pump after the Boy Scouts gave their permission to use their account at the marina to purchase anything they needed. They spent that night on the *Wynn D II*.

Stevenson considered the first hour or two of the voyage to be the sea trial and, if the vessel performed poorly, he would return to port. The *Wynn D II* had a 2300 PM capacity with ideal cruising at 1800 RPM. However, at 1800 RPM, the vessel had a slight vibration problem, which disappeared at 1500 RPM, or at eight to ten knots. The vessel lost one-half knot of speed due to the vibration problem. Stevenson still thought the vessel safe and capable of the trip to San Francisco.

The *Wynn D II* and *Girlfriend III* met outside the Los Angeles Harbor. After this, the crew noticed an oil gauge read "zero" but decided after a visual inspection that, since the engine did not overheat, the gauge was faulty. Shortly after, the generator ceased working, shutting down the vessel's power source, including the refrigerator and stove. At about the same time, the crew noticed the gas gauges were "tucked in an awkward position," which did not allow them an accurate reading. A true reading revealed the port tank was empty and the starboard tank was only one quarter full. To be safe, the crews transferred excess fuel from the

Girlfriend III to the *Wynn D II*, using the old bilge pump, transferring 50 to 60 gallons until the pump gave out. Stevenson estimated this would be enough to get them to San Francisco.

The National Weather Service forecast gale warnings, and although the vessels encountered large rolling swells, for these large vessels the sea was comfortable up to Monterey. From Monterey on, the ocean tends to be rougher, and the skippers had to decide whether to wait for a better forecast. The vessels spent Sunday night in Monterey, and Monday morning, in spite of the continuing forecast for storms, the skippers decided to continue as they could seek refuge at Moss Landing, Santa Cruz, or Half Moon Bay, as well as return to Monterey. They in fact had a smooth ride all the way to the South Channel to San Francisco Bay, except for some engine trouble by *Girlfriend III* which delayed them an hour. The National Weather Service issued a small craft warning and then an advisory at 2 p.m. from Redwood City that afternoon, but both vessels were well over the thirty-five feet maximum of small craft.

The *Girlfriend III* was one to two hundred yards ahead of the *Wynn D II* as the vessels approached the South Channel entrance to the San Francisco Bay. Martens, skipper of the *Girlfriend III,* radioed the *Wynn D II,* informing them he was taking the South Channel. Stevenson said he had no objection, nor was there any objection or discussion of the decision with the crew. Pleasure yachts and small vessels used the South Channel almost exclusively, as it is only four miles long, the shortest route from the south into San Francisco Bay. The other route from the south, the Main Channel, is used by the huge shipping vessels and the Coast Guard publication, *The Coast Pilot,* advises smaller vessels to take the South Channel to avoid the large ship traffic. The *Pilot* states that the North Channel, an alterate route, also used by smaller vessels, can be dangerous in heavy seas and large swells. Stevenson has taken the South Channel fifty-seven out of fifty-eight times he has delivered vessels from Southern California and had never encountered any problems, although he is aware that it could contain breaking waves in stormy conditions. Martens was also very familiar with the South Channel and conditions in the Bay.

As they both approached the South Channel, visibility was four miles, with light winds and moderate seas with large rolling swells spaced far apart, similar to conditions they encountered all along the coast. Martens, still about one to two hundred yards ahead, saw no breaking waves in the Channel and in fact could see the Marin Headlands and cars on the road in the distance. He radioed *Wynn D II* and told them he was going into the South Channel. Stevenson, who noted the good visibility and lack of breaking waves, voiced no objection and the crew neither voiced objection nor mentioned a concern about low fuel. As the *Girlfriend III* was halfway through the Channel, a huge breaking wave appeared, then a second and a third. Although it is not unusual to see breaking waves in the South Channel in heavy seas and storm conditions, these were larger than any Martens had seen. The Coast Guard advised him to turn his bow to the west to reach deeper water beyond the waves. Martens did and so advised Stevenson. The *Wynn D II* soon found itself surrounded by twenty to twenty-five foot waves, dropping from the crest of one wave into the trough of another as Stevenson turned the vessel west to deeper water. The entire crew was in the wheelhouse, which had no handholds anywhere. Most vessels of *Wynn D II*'s size and the overwhelming majority of vessels manufactured today do not contain handholds in the wheelhouse as standard equipment. Appellant Caskie braced himself by placing one hand on a table and the other against the dashboard, but the third roller coast wave threw him to the floor of the wheelhouse, where he landed on his buttocks, injuring his back.

The power of the waves tore a hole in the bow of the *Wynn D II* and completely ripped the wheelhouse off the *Girlfriend III*. Stevenson realized they were taking on too much water and that they had to abandon the vessel. Both skippers radioed the Coast Guard which sent out a forty foot rescue vessel. Unfortunately, the Coast Guard vessel was hit by a wave, rolled 360 degrees, and could not complete the rescue. The Coast Guard had to send a helicopter to airlift the crews off the vessels. Caskie was finally taken off the vessel about two and a half hours after the rescue call. The engine was still running at this time. One and a half hours later, the Coast Guard rescued the remaining crew mem-

bers, four hours after the initial call. The vessel did not run out of fuel, if at all, until this final evacuation occurred.

II. Discussion

A. *Jurisdiction*

The district court assumed jurisdiction of this case under the Limitation of Liability Act (the "Act"), 46 U.S.C.App. §§ 181 *et seq.* (1989). Under the Act, a shipowner faced with liability arising out of a single voyage may petition the appropriate federal district court for exoneration from liability or limitation of liability to the value of the ship itself. The court, upon obtaining control of the ship or the value of the ship from the petitioner, may enjoin all claimants from maintaining separate suits and require them to file all of their claims in the limitation proceeding. The court then determines whether shipowner is liable to any of the claimants and, if so, whether the shipowner's liability is limited under the Act to the value of the ship. Based on these determinations, the court may apportion the value of the ship among the claimants.

Appellant contends that the liability limitation provision of the Act, 46 U.S.C.App. § 183(a), does not apply to private, non-commercial vessels ("pleasure boats") such as the one at issue here. We disagree.

The Sixth Circuit has held that the liability limitation provision of the Act does apply to pleasure boats. *In re Young*, 1989 AMC 1217, 872 F.2d 176 (6 Cir. 1989). *Young* reaffirmed the rule of the Sixth Circuit, based on the plain wording of Section 183(a), that the liability limitation applies to "any vessel," including pleasure boats. The *Young* court noted that all Supreme Court and circuit court decisions to date are consistent with this decision, id. 1989 AMC at 1219, 872 F.2d at 177, and that holding otherwise would be an attempt to "judicially legislate." Id. 1989 AMC at 1221, 872 F.2d at 178.

We find the reasoning in *Young* persuasive. Accordingly, we hold that the limitation provision applies to pleasure boats, and that the district court had jurisdiction to hear this case.

B. *Liability under General Maritime Law or the Jones Act*

Once a proper limitation of liability petition has been filed, the court "must [first] determine what acts of negligence or conditions of unseaworthiness caused the accident." *Petition of M/V Sunshine, II,* 806 F.2d 762, 764 (11 Cir. 1987) (quoting *Farrell Lines, Inc. v. Jones,* 1976 AMC 1639, 1642-43, 530 F.2d 7, 10 (5 Cir. 1976)). That is, a liability must be shown to exist. "The whole doctrine of limitation of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit." *Northern Fishing & Trading Co. Inc. v. Grabowski,* 1973 AMC 1283, 1290, 477 F.2d 1267, 1272 (9 Cir. 1973).

The district court found that the proximate cause of Caskie's injury was an Act of God or peril of the sea and not unseaworthiness or negligence on the part of the owner. We affirm and find this dispositive of all other issues in the case.

Proximate cause is generally a mixed question of law and fact, *Lies v. Farrell Lines, Inc.,* 641 F.2d 765, 770 (9 Cir. 1981), but in this circuit it is a question for the fact finder, whose determination is binding on appeal unless clearly erroneous. *In re White Cloud Charter Boat Co., Inc.,* 1987 AMC 2216, 2221, 813 F.2d 1513, 1517 (9 Cir. 1987); *Armstrong v. United States,* 756 F.2d 1407, 1409 (9 Cir. 1985). There is a split in the circuits concerning the standard of review in an admiralty court's determination of negligence and apportionment of fault. See *Waterman Steamship Corp. v. Gay Cottons,* 1969 AMC 1682, 1697, 414 F.2d 724, 735 n. 27 (9 Cir. 1969) (and cases cited therein).

1. Unseaworthiness under general maritime law.

If the *Wynn D II* was unseaworthy at the time the injury occurred and the unseaworthiness was the cause of the injury, then the owner cannot claim limitation of liability under the Act. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 93-94, 1946 AMC 698, 703-04, (1946). If the unseaworthiness causes injury or death, the privity or knowledge of the master at or prior to the commencement of a voyage shall be deemed conclusively the privity and knowledge of the owner of such vessel, 46 U.S.C.App. § 183(c); *Waterman,* 1969 AMC at 1687, 414 F.2d at 728 n. 10.

"A boat owner's liability for unseaworthiness 'is a form of absolute duty owing to all within the range of its humanitarian policy.' " *Armour v. Gradler,* 448 F. Supp. 741 (W.D. Pa. 1978) (quoting *Seas Shipping Co.,* 328 U.S. at 95, 1946 AMC at 704). In essence, the doctrine requires that the vessel, including the hull, the decks, or the machinery, be reasonably fit for the purpose for which they are used. *Gutierrez v. Waterman S.S. Corp.,* 373 U.S. 206, 1963 AMC 1649 (1963).

The person claiming liability under the doctrine must first show that he was "in the ship's service" and the warranty extends to him. *Gebhard v. S.S. Hawaiian Legislator,* 1970 AMC 2056, 2067, 425 F.2d 1303, 1310 (9 Cir. 1970). Here the district court found, and it is not disputed, that Caskie was a Jones Act seaman bringing him within the scope of the warranty of seaworthiness. Secondly, the claimant must show that the injury was caused by a piece of the ship's equipment or an appurtenant appliance. *Gebhard* 1970 AMC at 2067-68, 425 F.2d at 1312. The third element is that the equipment used was not reasonably fit for its intended use. Id. The burden of proof to show unseaworthiness was on Caskie, the claimant. *Northern Fishing & Trading Co.,* 1973 AMC at 1288, 477 F.2d at 1271-72. Caskie contends that the *Wynn D II* was unseaworthy in that (1) the vessel lacked handholds in the wheelhouse; (2) the vessel lacked adequate fuel or the means to obtain fuel to complete the voyage; (3) the skipper was incompetent; (4) the vessel had a vibration problem.

The district court found the vessel to be seaworthy. Specifically, the district court found that the lack of handholds did not render the vessel unseaworthy, and that the vessel was "structurally fit and reasonably safe for the voyage." Handholds are not standard equipment on presently manufactured vessels. A ship only need be "reasonably suitable" to the purpose for which it was intended. *Litherland v. Petrolane Offshore Const. Services,* 1977 AMC 771, 775, 546 F.2d 129, 132 (5 Cir. 1977). "The warranty of the ship owner is not one of unconditional safety, but of fitness for duty of that which functions to provide the service tendered by the ship in the carriage of goods or people." *Smith v. American Mail Line, Ltd.,* 525 F.2d 1148, 1150 (9 Cir. 1975).

The district court also found that the *Wynn D II* had enough fuel for the voyage. This is not error as the court found that the engine in the ship was still running when Caskie was rescued and did not stop until at least four hours after their call to the Coast Guard. Also, no concern over lack of fuel was voiced when the decision was made to enter the South Channel. Thus, there is no causation between the lack of fuel and the loss of the vessel or Caskie's fall.

The district court found that the skipper and the crew were competent and did not render the vessel unseaworthy. The skipper, Stevenson, had made 58 similar vessel deliveries and this was the first vessel he had lost. All the crew members had ocean going experience. The tasks performed on the vessel, from Stevenson's inspection prior to departure, to the decision to go with the *Girlfriend III*, to the transferring of fuel in Monterey, to the vessel's entrance into the Bay, were performed with reasonable competence. Lastly, the vibration problem did not render the *Wynn D II* unseaworthy. The court found that the vessel lost only a half knot of speed by running at a low RPM. The court found that the vessel ran smoothly at 1500 RPM and traveled at an "adequate pace of eight to ten knots." Caskie cannot show that the vessel was unseaworthy. Hence Hechinger cannot be liable for "unseaworthiness."

2. Negligence under the Jones Act.

If the owner is not liable for "unseaworthiness," then Caskie must show negligence caused his injury, else there will be no owner liability to limit. See *Northern Fishing & Trading Co., Inc.*, 1973 AMC at 1288, 477 F.2d at 1271-72. To recover under a Jones Act claim, "[t]he plaintiff has the burden of establishing by a preponderance of the evidence, negligence on the part of his employer or one for whom the employer is responsible." *Litherland v. Petrolane Offshore Const. Services*, 1977 AMC at 775, 546 F.2d at 132. Then, the claimant must establish that the act of negligence was a cause, however slight, of his injuries. *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 771 (9 Cir. 1981) (citing *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-07, 1957 AMC 652 (1957)) (discusses proximate cause required

under FELA, and thus the Jones Act by reference); see 46 U.S.C.App. § 688 (Jones Act expressly provides for seamen the cause of action and judicially developed doctrine of liability granted to railroad workers by FELA). While the district court's determination of the absence of negligence is subject to the clearly erroneous standard, *In re White Cloud Charter Boat Co., Inc.*, 1987 AMC at 2221, 813 F.2d at 1517, whether a claim has been stated under the Jones Act is a question of law subject to *de novo* review. *Dalla v. Atlas Maritime Co.*, 1986 AMC 2257, 2257, 771 F.2d 1277, 1278 (9 Cir. 1985) (and cases cited therein).

Caskie argues that owner-Hechinger was negligent in five ways: (1) negligent hiring of Stevenson; (2) neglecting to give Stevenson adequate expense money, including money for fuel; (3) setting time constraints that prevented proper inspection of the vessel and hurried their arrival to San Francisco; (4) relying on a three month old survey of the vessel; and (5) failing to instruct Stevenson to ascertain whether the vessel was seaworthy before departing. The district court found that Hechinger's reliance on Underwood to find him a skipper was prudent and reasonable. Hechinger knew Underwood, having dealt with him before, and Underwood had been in the brokerage business for twenty-eight years which included numerous vessel deliveries. The court further found that, even if Hechinger was negligent in failing to provide Stevenson with expense money, that any problem resulting in a fuel shortage was cured when the *Wynn D II* transferred fuel from the *Girlfriend III*. Also, the decision to take the South Channel had nothing to do with any concern over fuel, so that negligence, if any, did not proximately cause the accident. Although Caskie claims there were time constraints, the evidence fails to show that Hechinger was concerned about time of arrival or that time constrants entered into any navigational decision. The trip was delayed a week so the two vessels could travel up the coast together. Stevenson took the time to inspect the vessel before they left. Even though Hechinger relied on a three month old survey, this reliance did not cause the accident as Stevenson inspected the vessel, finding it structurally and operationally fit for the voyage. Likewise, Hechinger's failure to tell Stevenson to inspect the vessel did not cause any harm. The district court's

findings are supported by the evidence and not clearly erroneous and its legal conclusions are reasonable under a *de novo* review.

Caskie also alleges that Stevenson was negligent in a variety of ways. However, Stevenson's failure to properly read the fuel gauges was "cured" in Monterey when the *Wynn D II* took fuel from the *Girlfriend III*. Stevenson's decision to leave Monterey, in spite of predicted adverse weather conditions, was prudent in that the vessel could have sought refuge at Moss Landing, Santa Cruz or Half Moon Bay or returned to Monterey. As it turned out, the weather conditions up to San Francisco Bay were calm and comfortable. The district court discussed Stevenson's decision to take the South Channel into San Francisco Bay at length. First, the South Channel was recommended by the *Coast Pilot* as large shipping vessels frequent the Main Channel and the North Channel is dangerous in stormy conditions. Second, the National Weather forecast at 2:00 p.m. on the day of the accident predicted moderate seas with heavy swells and issued a small craft warning, inapplicable to the forty-nine foot *Wynn D II* as small craft are vessels thirty-five feet or smaller. This was later changed to an advisory and it applied to the area outside the San Francisco Bay, not just the South Channel. Third, the visibility was at least four miles as Stevenson and Skipper Martens could see the Marin Headlands. The *Wynn D II* encountered diminishing seas and winds and neither Stevenson nor Martens, skipper of the *Girlfriend III*, saw any breaking waves in the Channel. Fourth, the *Girlfriend III*, without objection or voiced concern from the crew of *Wynn D II*, went first into the channel, essentially acting as a lookout for the *Wynn D II*. The district court found that Stevenson and Martens both weighed the high visibility, the favorable conditions and the fact that the South Channel is usually used by smaller vessels, with the possibility of breaking waves in the South Channel during stormy conditions and other possible dangers. The district court made a factual finding that the conditions turned from comfortable to dangerous in a matter of minutes and that huge breaking waves appeared out of nowhere. The Coast Guard instructed the *Girlfriend III* to turn its bow west and head for deeper water which both skippers did. The district court concluded that there was no negligence in the actions of Stevenson or the crew in the navigation of *Wynn D II*. Caskie's

argument that Stevenson should have known that breaking waves of that size can come up quickly in the South Channel benefits from hindsight. At the time, the conditions indicated that the South Channel was the safest route. The Coast Guard cutter that came to rescue them did a 360° turn in the breaking waves and turned back, showing that even the Coast Guard was caught unawares and could not predict the conditions.

The district court concluded that, because the vessel was safe and seaworthy, and no negligence existed on the part of Hechinger or Stevenson and the *Wynn D II* crew, the cause of the accident was an Act of God or peril of the sea. Hence, there is no liability on the part of Hechinger, and thus no liability to limit.

III. Conclusion

The district court's findings of fact are not clearly erroneous and its conclusions of law based on those findings are reasonably supported by the evidence. The district court's judgment is affirmed.

Appendix B

IN THE MATTER OF THE COMPLAINT OF GLENN R. HECHINGER, AS CHARTERER AND OWNER *PRO HAC VICE* OF THE TRAWLER *WYNN D II*, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

[and related cross-action]

United States District Court, Northern District of California,
March 6, 1988
No. C-86-4793 WHO

COLLISION — 151. Inevitable Accident, Latent Defect, Breakdown, Via Major — LIMITATION OF SHIPOWNER'S LIABILITY — 12, Losses to Which Applicable — 121. Seaworthiness, Due Diligence of Owner — PERSONAL INJURY — 13126. Living and Working Conditions — 17211. Injury by Wave or Weather.

Trawler owner is entitled to exoneration from liability for crewmember's injury resulting from extremely high seas in the South Channel entrance to San Francisco Bay which constituted an Act of God. The absence of handholds in the wheelhouse did not render the trawler unseaworthy, and the master's choice of route was not negligent.

GEOGRAPHICAL INDEX — 39. San Francisco — South Channel Entrance.

Terence S. Cox and Dorene M. Eddy (Derby, Cook, Quinby & Tweedt) for *Petitioner Glenn R. Hechinger*

Lyle C. Cavin, Jr. and Joseph W. Klobas (Law Offices of Lyle C. Cavin, Jr.) *for Claimant Stewart Caskie*

WILLIAM H. ORRICK, D.J.:

These actions arise out of the abandonment of the vessel *Wynn D II* near the South Channel entrance to San Francisco Bay on December 2, 1985. The *Wynn D II* was approximately halfway through the South Channel when breaking waves twenty to twenty-five feet high suddenly surrounded the vessel. The vessel, a trawler forty-nine feet in length, sought safety by turning its

nose to the west, attempting to reach deeper water beyond the breaking waves. Claimant Stewart Caskie injured his back when the vessel dropped from the crest of one wave into the trough of the next, the force of the sea throwing him to the floor of the wheelhouse.

Caskie seeks compensation under the Jones Act, 46 U.S.C. sec. 688, for negligence and under general maritime law for unseaworthiness. Glenn R. Hechinger, owner *pro hac vice* of the *Wynn D II*, petitions for exoneration from or limitation of liability under the Limitation of Liability Act, 46 U.S.C. sec. 183. The crux of the action is whether the *Wynn D II* was unseaworthy because it lacked handholds in the wheelhouse and whether the skipper, Paul Stevenson, was negligent in taking the South Channel entrance instead of the Main Channel entrance to San Francisco Bay.

Based upon the evidence and testimony at trial, the Court finds for Hechinger. The proximate cause of the accident was an Act of God or peril of the sea.

Skipper Stevenson and crew member Vicky Oswald seek compensation for the loss of their personal belongings under the Limitation of Liability Act. Id. Because the Court fails to find any negligence or unseaworthiness their claims must similarly fail.

The Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

Findings of Fact

1. The *Wynn D II*, a forty-nine foot Klondike motor trawler built in 1976, was originally owned by Bernard and Winifred Davis. In September 1985, they donated the vessel to the Boy Scouts of America ("Boy Scouts").

2. Prior to the donation, on August 13, 1985, Robert Shadbolt & Associates surveyed the *Wynn D II* out of the water. The survey found the vessel to be fit and seaworthy. The surveyor recommended minor repairs, which were made as evidenced by invoices stapled to the survey.

3. At about this time, Hechinger was interested in finding a large wooden motor boat to live on with his wife at a marina in Alameda, California. Hechinger, a forty-one-year-old manager of computer sensors for Pacific Bell, has limited boating experience. He has owned boats since 1982 but has made only three or four trips on ocean waters.

4. Hechinger contacted Ken Underwood, a boat sales broker and the principal of Edgewater Yachts Brokerage in Sausalito, California, and told him of his interest. Hechinger and Underwood had a common interest in classic wooden boats and had known each other for some time.

5. The Boy Scouts, who had previously sold boats through Underwood, told him that the *Wynn D II* was for sale. Underwood showed Hechinger pictures of the vessel and informed him of the survey. Hechinger was interested and arranged to visit the vessel at its home port in Newport Beach, California.

6. Hechinger traveled to Newport Beach near the end of October. He spent two to three hours inspecting the vessel and met with Andrew Fitzpatrick, the Boy Scouts' representative. The next day Hechinger and representatives of the Boy Scouts took the vessel on a sea trial. It lasted about two-and-one-half hours, but only one-half hour was spent on ocean waters. The vessel handled well and ran smoothly.

7. Within a few weeks Hechinger, Fitzpatrick, and Underwood all met at the offices of Edgewater Yachts in Sausalito. The parties agreed that Hechinger would lease the vessel for two years, with an option to buy, for a total price of $66,000. Two documents, dated November 6, 1985, and November 18, 1985, were executed evidencing the agreement.

8. The parties have stipulated that Hechinger is the "owner" of the *Wynn D II*.

9. Hechinger was virtually a novice at long coastal voyages, knew little about ocean travel, and had no idea how to get the vessel from Newport Beach to Alameda. He asked Underwood, as an experienced broker knowledgeable in vessel deliveries, to make arrangements for the vessel to be delivered to Alameda.

10. Underwood has worked as a yacht broker for the past twenty-eight years. He has arranged for vessels to be delivered throughout that span.

11. Underwood spoke to Stevenson concerning the delivery. He knew Stevenson personally, and knew that Stevenson had made many vessel deliveries up the coast.

12. Stevenson has been a skipper for twenty years. He has delivered vessels for the past twelve years. He has delivered fifty-eight vessels, varying from twenty-seven to one hundred forty-seven feet, up the California coast. He never suffered a casualty before the *Wynn D II*.

13. Underwood put Stevenson in telephone contact with Hechinger. It was agreed that Stevenson would make all arrangements to bring the vessel up the coast, including hiring the crew and preparing the vessel for departure, except that Underwood would arrange to have the oil and fuel filters changed and the fuel tanks filled. Stevenson charged $500 plus expenses for the delivery. Expenses included the crew's airfare to Newport Beach and all costs incurred to bring the vessel up the coast.

14. Underwood contacted the Boy Scouts, and representatives of the Boy Scouts changed the filters and filled the tanks with fuel.

15. Hechinger did not impose a deadline for delivery on Stevenson. He never met or spoke with any crew member. It was up to Stevenson to decide when to leave for Newport Beach and when to arrive in Alameda. Hechinger planned on redecorating the interior of the *Wynn D II*; he did not intend to begin living on the vessel in December 1985.

16. After speaking with Stevenson and confirming with Underwood that he would arrange for the filters to be changed and the fuel tanks filled, Hechinger had no further contact with the crew or the vessel until he learned of the abandonment outside San Francisco Bay.

17. Stevenson hired crew members Stewart Caskie, Scott Metcalf, and Vicki Oswald for the voyage north. All three lived on boats in the Sausalito area.

18. Caskie has oceangoing experience. He has traveled outside the Golden Gate and has taken the helm on many of those trips. Stevenson personally saw him pilot motor boats in and out of the harbor.

19. Metcalf has vast experience in ocean waters. His father was a tow captain and taught him about the sea. Metcalf has skippered tugboats for the past six years.

20. Oswald was a crew member on a sailboat that was laying over in Sausalito, and she had extra time to crew on the *Wynn D II*.

21. Stevenson learned that Underwood had arranged for another vessel to be delivered from Southern to Northern California. Stevenson delayed his departure one week so that the two vessels could travel up the coast together. The other vessel, the *Girlfriend III*, was a sixty foot antique motor cruiser built in 1929. Bruce Martens skippered the *Girlfriend III*. He has made over two hundred coastal voyages between Seattle and San Diego. He has lived on boats in the Bay Area his entire life.

22. Stevenson asked Hechinger to advance $300 of the expense money. Hechinger had planned a trip to the mountains that weekend and did not have time to drop a check off in Sausalito. Instead, Hechinger mailed a check to Underwood's office. The check did not arrive until after the crew had left for Newport Beach. Stevenson used some of his own money to pay for part of the airfare of the crew and, after purchasing food and supplies for the voyage, he had about $60 in his possession.

23. Stevenson and the crew left for Newport Beach by plane on November 29, 1985.

24. Stevenson and the crew spent Friday night, November 29, 1985, on the *Wynn D II*. A Boy Scouts' representative told Stevenson that the filters had been changed and the fuel tanks "topped off." The engine was warm and fuel could be seen near the tanks where some had spilled. The sight gauges read full.

25. The crew spent Friday morning preparing for the voyage. Oswald and Metcalf purchased food and other supplies. Steven-

son and Caskie inspected the structural elements of the vessel, its hoses, delivery systems, navigational lights, and radio.

26. Stevenson was pleased that Hechinger left it to him to check out the vessel before they left because he trusted his own inspection more than an inspection conducted by someone he did not know. It was part of Stevenson's normal delivery routine to personally inspect the seaworthiness of the vessel.

27. Stevenson found the vessel to be structurally fit and safe for the trip north.

28. Caskie had to replace the bilge pump and clamp down some of the hoses. The crew purchased a new bilge pump after the Boy Scouts gave their permission to use their account at the marina to purchase anything they needed for the voyage.

29. The *Wynn D II* had some chairs and bar stools that were not tied down or nailed to the floor.

30. The pilothouse did not have any handgrips attached to the ceiling or the walls.

31. The *Wynn D II* departed from Newport Beach around noon on Saturday, November 30, 1985.

32. Stevenson considered the first hour or two of the voyage to be the sea trial. If a vessel does not perform adequately, his normal routine is to go back to port.

33. The *Wynn D II* had a capability of 2300 RPM. Ideal cruising RPM for that vessel for a long voyage would be 1800 RPM. At 1800 RPM the vessel had a slight vibration problem; at 1500 RPM it ran smoothly without any vibrations. The vessel went eight to ten knots at 1500 RPM. It lost one-half knot of speed because of the vibration problem. Stevenson thought the vessel was seaworthy, both operationally and structurally, for the trip to San Francisco Bay.

34. The *Wynn D II* rendezvoused with the *Girlfriend III* outside Los Angeles Harbor; both vessels pointed their bows north and set their course for San Francisco.

35. After departing Los Angeles Harbor, an oil pressure gauge on the *Wynn D II* read "zero." The crew could not check the oil

because the engine was running. They made a visual inspection, which revealed nothing. The crew concluded that the gauge was at fault because the vessel did not overheat.

36. The *Wynn D II*'s generator quit working. As a result, the vessel's refrigerator and stove lost their power source, and the crew could only eat canned foods and crackers for the remainder of the voyage.

37. At about the same time the crew noticed that each fuel tank had a valve tucked in a very awkward position near the bottom of the tank. The crew realized that the valve must be turned in order to get an accurate reading on the sight gauges. They soon discoverd that the port tank was empty and the starboard tank was only one quarter full.

38. For safety reasons, the *Wynn D II* and *Girlfriend III* decided to pull into Monterey so that the crews could transfer excess fuel from the *Girlfriend III* to the *Wynn D II*. The crew used the old bilge pump to transfer fuel. Somewhere between fifty and sixty gallons were transferred when the pump ceased working. According to Stevenson's calculations, there was enough fuel for the remaining voyage to San Francisco Bay.

39. The National Weather Service issued storm and gale warnings when the vessels were between Los Angeles and Monterey. The vessels encountered large rolling swells spaced far apart up to Monterey but, for these large vessels, the sea conditions were comfortable. No storms or gales developed. The two vessels arrived in Monterey around midnight. The skippers knew that the ocean tends to become rougher farther north, and a decision had to be made whether to leave for San Francisco Bay or wait until the forecast improved.

40. The two vessels spent Sunday night in Monterey. On Monday morning, December 2, 1985, the forecast called for similar conditions. The skippers decided to proceed up the coast because they had four options if they ran into dangerous waters; they could seek refuge at Moss Landing, Santa Cruz, or Half Moon Bay, or they could turn around and go back to Monterey.

41. The storm that had generated the warnings over the past several days had moved to the north. The forecast outside Monterey now called for diminishing seas and winds. Indeed, the vessels encountered comfortable conditions all the way to the entrance to the South Channel. The conditions did not warrant seeking refuge.

42. The *Girlfriend III* temporarily lost its engines between Monterey and San Francisco, which caused a delay of about one hour.

43. On Monday, December 2, 1985, at 2:00 p.m., the National Weather Service in Redwood City issued a "small craft warning." The warning added that the swells were potentially hazardous outside San Francisco Bay. "Small craft" means thirty-five feet and under. The *Wynn D II* was forty-nine feet long. The warning was reduced to a "small craft advisory" later in the day.

44. The *Girlfriend III* was one hundred to two hundred yards ahead of the *Wynn D II* as the vessels approached the South Channel entrance to San Francisco Bay. Martens, the skipper, radioed the *Wynn D II,* informing them that he was taking the South Channel. Martens asked if there were any objections and Stevenson radioed back "no." The crew on board the *Wynn D II* voiced no objection to his decision. In fact, there was no discussion regarding the decision.

45. There are two entrances to San Francisco Bay from the south — the South Channel and the Main Channel. The South Channel is used almost exclusively by pleasure yachts and smaller vessels. It is also the shortest route to San Francisco Bay from the south. It is approximately four miles long. The Main Channel is used almost exclusively by the huge shipping vessels that visit San Francisco. The Coast Guard publishes a guidebook, *The Coast Pilot,* which contains information regarding the various entrances to San Francisco. The guidebook states that smaller vessels normally use the South Channel when approaching San Francisco Bay from the south in order to avoid the huge shipping vessels in the Main Channel. It states that the North Channel can be particularly dangerous in heavy seas and large swells. The guidebook contains no such warning regarding the South Channel. The

North Channel is similar to the South Channel in that it is used mainly by smaller vessels when traveling north of San Francisco Bay.

46. Stevenson, the skipper of the *Wynn D II,* has made fifty-eight vessel deliveries from Southern California to San Francisco. He has taken the South Channel fifty-seven out of the fifty-eight voyages. He has never encountered any problems in the South Channel. Despite the lack of warning in *The Coast Pilot,* Stevenson is aware that the South Channel may contain breaking waves in stormy weather. Martens, the skipper of the *Girlfriend III,* has lived on boats in the Bay Area all his life and is very familiar with the conditions outside San Francisco Bay. Martens has always used the South Channel when entering San Francisco Bay from the south. He is also aware that the South Channel can be dangerous in storm conditions. Neither skipper had suffered a casualty before their respective vessels were abandoned on December 2, 1985.

47. As the vessels approached the South Channel, visibility was four miles and winds were light. The sea was moderate with large rolling swells spaced far apart. The conditions were no worse than what they had encountered throughout the voyage. The *Girlfriend III* was one hundred to two hundred yards ahead of the *Wynn D II*. Martens had good visibility. He could see cars on land and the Marin Headlands in the distance. He did not see any breaking waves in the Channel. He radioed the *Wynn D II* and told them he was taking the South Channel. Martens asked if there were any objections.

48. Stevenson radioed back and told Martens that the *Wynn D II* had no objections. Stevenson likewise had good visibility. He did not see any breaking waves in the Channel. No crew member of the *Wynn D II* voiced any opinion as to which route to take. No one on board the *Wynn D II* mentioned any concern over the weather, and no one mentioned the fact that the vessel may have been low on fuel.

49. About halfway through the South Channel, the *Girlfriend III*'s crew saw a huge breaking wave appear, and then they saw a second and a third breaking wave. Martens had never seen such

huge waves. He radioed the Coast Guard and was advised to turn the bow of the *Girlfriend III* to the west so that he could reach deeper water beyond the breaking waves. He radioed the *Wynn D II* and told them he was turning west.

50. The *Wynn D II* soon found itself surrounded by breaking waves twenty to twenty-five feet high. Stevenson similarly turned the vessel towards the west in an attempt to get out beyond where the waves were breaking. The vessel would take a sudden drop from the crest of one wave into the trough of another in an attempt to find deeper water. The entire crew was in the wheelhouse. Caskie braced himself by placing one hand on a table and the other against the dashboard. He could find nothing to grasp because the vessel did not have any handholds on the ceiling or the walls of the wheelhouse. On the third roller-coaster ride over the waves, Caskie was thrown to the floor of the wheelhouse as the vessel dropped from the crest of one wave into the trough of the next. He landed on his buttocks and injured his back.

51. The power of the waves tore a hole in the bow of the *Wynn D II*. The vessel was taking on water and Stevenson realized that they had to abandon the vessel. The violent sea completely ripped the wheelhouse off the *Girlfriend III* and it was in more trouble than the *Wynn D II*. The skippers radioed the Coast Guard.

52. The Coast Guard sent a rescue vessel that measured forty-four feet in length. That vessel rolled 360 degrees as it met the waves on its way to the *Girlfriend III* and the *Wynn D II*. The Coast Guard eventually sent a helicopter to rescue the crews. About two-and-one-half hours after radioing for help, the Coast Guard airlifted Caskie off the *Wynn D II*.

53. The *Wynn D II*'s engine was still running when Caskie was airlifted off the vessel.

54. Stevenson and the rest of the crew were rescued from the *Wynn D II* about one-and-one-half hours later, four hours after the initial "May Day" call. If the vessel ran out of fuel, it did so as the final evacuation occurred, but not before then.

55. The crew abandoned the *Wynn D II*.

56. In heavy seas and stormy conditions it is not unusual to see breaking waves in the South Channel.

57. Most vessels the size of the *Wynn D II* do not have handholds in the wheelhouse.

58. The overwhelming majority of vessels manufactured today do not contain handholds in the wheelhouse as standard equipment.

Conclusions of Law

1. This Court has jurisdiction over this action by virtue of 46 U.S.C. secs. 183 and 688 and this Court's admiralty jurisdiction.

2. At the time of his injury Caskie was a Jones Act seaman because he was a member of the crew, the vessel was in navigation, and his duties contributed to the essential mission of the vessel. *Nelson v. Greene Line Steamers, Inc.*, 1959 AMC 1139, 255 F.2d 31 (6 Cir.) cert. denied, 358 U.S. 867 (1958).

3. If the proximate cause of an accident at sea is unexpected extremely high seas that constitute a peril of the sea or an Act of God, the owner of the vessel is not liable. *In re United States (Invincible) for Limitation of Liability*, 1963 AMC 1469, 216 F.Supp. 775 (D. Or. 1963).

4. A shipowner may limit his liability for any loss, damage, or injury to the amount or value of the owner's interest in the vessel if "done, occasioned, or incurred" without the privity or knowledge of the owner, 46 U.S.C. sec. 183.

5. If the owner is not liable, then there is nothing to limit under 46 U.S.C. sec. 183. *In re Cherokee Trawler Corp.*, 1958 AMC 381, 157 F.Supp. 414 (ED Va. 1957).

6. *In re Hercules Carriers, Inc.*, 556 F.Supp. 962 (11 Cir. 1983), articulates a two-step analysis in determining whether a shipowner is entitled to limit his liability. First, the court must determine what acts of negligence or conditions of unseaworthiness, if any, caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness. A

claimant has the initial burden of proving negligence or unseaworthiness. The burden then shifts to the petitioner to show lack of privity or knowledge.

7. To recover under a Jones Act claim, the claimant's burden is to show that an act of negligence was a cause, however slight, of his or her injuries. *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 507-508, 1957 AMC 652, 653-55 (1957).

8. To recover under a claim for unseaworthiness under general maritime law, the claimant must prove causation in the traditional sense; the unseaworthy condition must substantially contribute to producing the injury, and the injury must be a direct result or a reasonably probable consequence of the unseaworthy condition. *Litherland v. Petrolane Offshore Construction Services,* 1977 AMC 771, 775, 546 F.2d 129, 132 (5 Cir. 1977).

9. Liability for an unseaworthy condition does not in any way depend upon negligence or fault. The shipowner is liable for all injuries proximately caused by an unseaworthy condition even though the owner may have exercised due care and may have had no notice or knowledge of the unseaworthy condition. Unsafe conditions may render a vessel unseaworthy. Id.

10. The legal standard of unseaworthiness is not confined by notions of custom or practice in the industry. The duty of the shipowner is to assure a reasonably safe ship for all who work on board. The shipowner must satisfy the trier of fact that the ship is safe. *Venable v. A/S Forenede Dampskibsselskab,* 1968 AMC 1437, 1443, 399 F.2d 347, 352-353 (4 Cir. 1968).

11. With respect to loss of life or bodily injury, the privity or knowledge of the master at or prior to the commencement of a voyage shall be deemed conclusively the privity or knowledge of the owner of such vessel. 46 U.S.C. sec. 183(e). Knowledge means both actual knowledge and that knowledge that a diligent inspection of the vessel would have disclosed. *In re Hercules Carriers, Inc.,* 768 F.2d 1558, 1564 (11 Cir. 1985).

12. Caskie contends that the *Wynn D II* was unseaworthy in the following respects: (1) the vessel lacked handholds in the wheelhouse; (2) the vessel lacked adequate fuel or the means to

obtain fuel to complete the voyage; (3) the skipper was incompetent; and (4) the vessel had a vibration problem.

The Court finds that the *Wynn D II* was reasonably safe and seaworthy for the trip to San Francisco Bay. Stevenson ran the vessel at 1500 RPM instead of the ideal 1800 RPM because of a vibration problem. The vessel lost only a half knot of speed by running at a lower RPM. The vessel ran smoothly at 1500 RPM and traveled at an adequate pace of eight to ten knots. The vessel was operationally fit for the voyage.

The skipper and crew of the *Wynn D II* were competent. Stevenson had made fifty-eight vessel deliveries from Southern to Northern California without a single casualty. Caskie, Metcalf, and Oswald all had oceangoing experience and all adequately performed their tasks during the voyage.

The *Wynn D II* had enough fuel to complete the voyage to San Francisco Bay. The vessel's engine was still running four hours after the vessel was inundated by the waves. Moreover, any concern over a lack of fuel played no part in the decision to take the South Channel. Thus, even if the vessel was low on fuel, the condition did not proximately cause the loss of the vessel or Caskie's fall.

The *Wynn D II* lacked handholds in the wheelhouse, but this did not render the vessel unseaworthy. Most vessels do not have handholds in the wheelhouse. Handholds are not standard equipment on presently manufactured vessels. A vessel must only be reasonably safe for its intended purpose. *Venable*, supra. The *Wynn D II* was structurally fit and reasonably safe for the voyage.

13. Caskie argues that Hechinger was negligent in the following matters: (1) the manner in which he hired Stevenson; (2) sending Stevenson to Newport Beach without sufficient money to meet reasonably anticipated expenses, including the purchase of fuel; (3) placing Stevenson under time constraints that prevented a diligent inspection of the vessel and hurried his arrival to San Francisco Bay; (4) relying on a three month old survey that did not include an operational, survey; and (5) not instructing Stevenson to ensure the seaworthiness of the vessel prior to departure.

Hechinger was prudent in relying on Underwood to provide a competent skipper. Underwood has been in the brokerage business in Sausalito for twenty-eight years and has arranged numerous deliveries.

Hechinger may have been negligent in failing to provide Stevenson with enough expense money. However, because the possible shortage of fuel was remedied in Monterey, and because any concern over a lack of fuel played no part in the decision to take the South Channel, the negligence did not proximately cause the accident.

The evidence showed that Stevenson was not placed under any time constraints. The delivery was delayed one week so that the two vessels could travel up the coast together. Stevenson adequately inspected the vessel before departing. The evidence failed to show how any time constraints influenced the decision to leave Monterey or to take the South Channel.

Hechinger did rely on a three-month-old survey, but because the vessel was both structurally and operationally fit for the voyage, this did not proximately contribute to the accident.

Hechinger may have failed to instruct Stevenson to inspect the vessel before departing, but Stevenson did so anyway. Stevenson found the *Wynn D II* to be seaworthy, and the vessel was indeed seaworthy. Any failure on the part of Hechinger to tell Stevenson to inspect the vessel had no proximate relation to the later misfortunes.

14. Caskie argues that Stevenson was negligent because he (1) failed to turn the bottom valves when reading the sight gauges, preventing an accurate check on the fuel level; (2) left Monterey under adverse weather conditions; and (3) took the South Channel entrance to San Francisco Bay instead of taking the Main Channel.

Stevenson should have turned the bottom valves when checking the fuel level. However, the fuel problem was cured in Monterey, and the crew did not consider how much fuel they had when they decided to enter San Francisco Bay through the South Channel. The fuel situation did not proximately contribute to the accident.

Stevenson acted prudently in leaving Monterey. The *Wynn D II* had four points of refuge in case it got into trouble. The vessel could have pulled into Moss Landing, Santa Cruz, or Half Moon Bay, or it could have gone back to Monterey. The conditions between Monterey and the South Channel were comfortable and did not dictate seeking refuge.

The Court finds that Stevenson acted within the bounds of prudence in taking the South Channel. A skipper must make a judgment call when navigating a course at sea. The prudent skipper considers the forecast, the present conditions, and the visual field in front of him or her in making that call. A prudent captain should also consider any publications describing the pertinent ocean waters.

The National Weather Service forecast at 2:00 p.m. on the day of the accident called for moderate seas with heavy swells and included a "small craft warning." The warning added that the swells were potentially hazardous outside San Francisco Bay. The swells diminished as the day passed, and only a "small craft advisory" was in effect by 5:00 p.m., roughly the time of the accident. "Small craft" refers to vessels thirty-five feet and under. The *Wynn D II* was forty-nine feet long. Thus, at the time the *Wynn D II* was approaching the South Channel, only an advisory was in force, and that advisory did not apply to vessels the size of the *Wynn D II*. Moreover, the advisory applied to the entire area outside San Francisco Bay, not just the South Channel. The forecast did not dictate taking the Main Channel instead of the South Channel.

Approaching the South Channel the *Wynn D II* encountered diminishing seas and winds. The swells were still large, but they were rolling swells spaced far apart and presented no problems for a vessel the size of the *Wynn D II*. Visibility was excellent at four miles; the skippers could see all the way through the Channel to the Marin Headlands. Conditions looked satisfactory to both Martens and Stevenson because neither skipper saw breaking waves in the Channel. The *Girlfriend III* was one hundred to two hundred yards ahead of the *Wynn D II*. Martens radioed Stevenson, telling him that he was taking the South Channel. Martens asked if there were any objections, and Stevenson radioed back

"no." Thus, not only did the forecast and present conditions justify taking the South Channel, but Stevenson and the *Wynn D II* had a lookout in front of them in the *Girlfriend III*. No one on either vessel mentioned any concerns over the present conditions or possible lack of fuel when entering the Channel.

The Coast Pilot, the Coast Guard guidebook, states that smaller vessels usually take the South Channel when entering San Francisco Bay from the south in order to avoid the large shipping vessels in the Main Channel. The book warns that dangerous conditions may exist in the North Channel in stormy conditions. The Coast Guard manual makes no such warning concerning the South Channel. It seems prudent, therefore, to take the South Channel when only a small craft advisory is in effect.

The evidence showed that it is not uncommon to see breaking waves in the South Channel when stormy weather prevails over the Bay Area. Stevenson and Martens were aware of the possible dangers in the South Channel. A competent skipper can only make a judgment call when navigating a course. In the instant case the forecast and the present conditions, coupled with excellent visibility, did not warrant taking the Main Channel instead of the South Channel, which is the normal route for smaller vessels. The evidence was overwhelming that the conditions turned from comfortable to dangerous in a matter of minutes and that huge breaking waves appeared out of nowhere. The Coast Guard instructed the *Girlfriend III* to turn its bow west and head toward deeper water, which both the *Girlfriend III* and the *Wynn D II* did. Consequently, the Court fails to find any negligence in the actions of Stevenson or the crew in the navigation of the *Wynn D II*.

15. Accordingly, the Court finds for Hechinger. The *Wynn D II* was seaworthy for the voyage and the skipper acted prudently in directing the vessel to take the South Channel entrance to San Francisco Bay. The cause of the accident was an Act of God or peril of the sea.

16. The related claims of Oswald, Metcalf, and Stevenson to recover damages for the loss of their personal belongings must similarly fail.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE COMPLAINT OF GLENN R. HECHINGER, AS CHARTERER AND OWNER *PRO HAC VICE* OF THE TRAWLER *WYNN D II*, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

GLENN R. HECHINGER, *Plaintiff-Appellee*

v.

STEWART CASKIE, *Defendant-Appellant*

No. 88-2525
D.C. N. CV-86-2763-WHO
[FILED MAR 7 1990]
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ORDER

Before: Norris, Beezer and Brunetti, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

(2)

No. 90-59

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

STEWART CASKIE,
Petitioner,

VS.

GLENN R. HECHINGER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*, applies to pleasure vessels.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Stewart Caskie, and the respondent, Glenn R. Hechinger.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Statement Of The Case	2
Summary Of Argument	4
Argument	5
A. There Are No Special And Important Reasons For Granting This Petition In The Circumstances Of This Case	5
1. The Supreme Court And All Circuit Courts Of Appeal Have Construed the Limitation Statute To Apply To Pleasure Vessels	6
2. Rules of Statutory Construction Dictate That Pleasure Vessels Are Included Within The "Any Vessel" Language of the Act	10
3. Logic, Public Policy and Basic Fairness Require That Pleasure Vessels Be Given The Benefit of Limitation of Liability	14
Conclusion	17

TABLE OF AUTHORITIES

Cases

Page

Air Transport, Etc. v. Profess Air Traffic, Etc., 667 F.2d 316 (2nd Cir. 1981) 13
Bear v. Doe, 432 U.S. 438, (1977) 9
Complaint of Brown, 536 F. Supp. 750 (N.D. Ohio 1982) 7, 12, 14
Complaint of Keys Jet Ski, Inc., 714 F.Supp. 1057 (S.D. Fla. 1989) 9
Complaint of Paradise Holdings, Inc., 795 F.2d 756 (9th Cir. 1986) 8
Complaint of Tracey, 608 F.Supp. 263 (D. Mass. 1985) ..9, 10
Coryell v. Phipps, 317 U.S. 406, (1943) 6, 8
Estate of Lewis, 603 F.Supp. 217 (N.D. Cal. 1987) 9
Evansville & B.G. Packet Co. v. Chevo Cola Bottling Co., 271 U.S. 79, (1926) 14
Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) 14, 15
Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975) 8
Heffron v. International Society for Krishna Consc., 452 U.S. 640, (1981) 9
Just v. Chambers, 312 U.S. 383 (1941) 6
Matter of Sisson, 668 F.Supp 1057 (N.D. Ill. 1987) 9
Otto v. Alper, 489 F.Supp 953 (D. Del. 1980) 12
Petition of Klarman, 295 F.Supp. 1021, 1022 (D. Conn. 1968) 12
Richards v. Blake Builder's Supply, Inc., 528 F.2d 745 (4th Cir. 1975) 8
Sisson v. Ruby, 110 S.Ct. 2892 (1990) 6, 7, 15
St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974) 14
St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981) 9
The MAMIE, 5 Fed. 813 (E.D. Mich., 1881) aff'd., 8 Fed. 367 (1881) 6
United States v. Constantine, 296 U.S. 287 (1935) 9

TABLE OF AUTHORITIES

Statutes

	Page
1 U.S.C. § 3	14
28 U.S.C. § 1254(1)	2
Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*	1, 4
46 U.S.C. § 183, *et seq.*	*Passim*
46 U.S.C. § 185	3
46 U.S.C. § 188	6, 10, 11
Limitation Act of 1851	10

Rules

Senate Report No. 2061 on *Limitation of Shipowners' Liability*, May 12, 1936, 74th Congress, 2d Session (Calendar No. 2165)	13
Supreme Court Rule 10	5

Other Authorities

3 *Benedict on Admiralty*, 1-22	10
Gilmore and Black, *The Law of Admiralty*, (2nd Ed., 1975)	8

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 890 F.2d 202 (9th Cir. 1990), and is attached as Appendix "A" to Caskie's petition.

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of California (Orrick, D.J.) are reported at 1988 AMC 2857, and are attached as Appendix "B" to Caskie's petition.

JURISDICTION

Invoking jurisdiction under 46 U.S.C. § 181 *et seq.* (the Limitation of Liability Act), respondent brought this suit in the Northern District of California. On March 7, 1988, judgment was entered in favor of respondent.

On petitioner's appeal, the Ninth Circuit, on November 27, 1989, entered a judgment and an opinion affirming the District Court's judgment. On March 7, 1990, the court denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

On May 16, 1990, Justice O'Connor ordered that the time for filing a petition for writ of certiorari in this case be extended, up to and including July 5, 1990.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

46 U.S.C. § 183(a):

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 188:

> Except as otherwise specifically provided therein, the provisions of sections 175, 182, 183, 183b to 187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

STATEMENT OF THE CASE

This action arises out of the abandonment of the 49-foot trawler, WYNN D II, near the South Channel entrance to San Francisco Bay on December 2, 1985. The WYNN D II was approximately halfway through the Channel when breaking waves

20 to 25 feet high suddenly surrounded the vessel. The WYNN D II sought safety by turning its bow to the west, attempting to reach deeper water beyond the breaking waves. Petitioner, Caskie, injured his back when the vessel dropped from the crest of one wave into the trough of the next, the force of the sea throwing him to the floor of the wheelhouse.

The WYNN D II had been leased by respondent, Glenn R. Hechinger, and the parties have stipulated that he was the "owner" of the vessel. Through an experienced yacht broker, Hechinger arranged to have the vessel delivered to him in Alameda, California, from its berth in Newport Beach, California, by an experienced delivery skipper, Paul Stevenson. Stevenson had been a delivery skipper for 20 years. He had previously delivered 58 vessels, varying from 27 to 147 feet in length, up the California Coast without incident. Stevenson hired three experienced crew members, including petitioner, for the voyage north.

On the day before the voyage began, the crew inspected the structural elements of the vessel, its hoses, delivery systems, navigational lights and radio. Stevenson found the vessel to be structurally fit and safe for the trip north.

During the voyage, the WYNN D II rendezvoused with another vessel, the GIRLFRIEND III, outside Los Angeles Harbor, and headed north for San Francisco. Sea conditions were comfortable until the vessel reached the South Channel entrance to the Golden Gate outside San Francisco Bay. As the WYNN D II was approximately halfway through the Channel, it encountered unusually heavy seas and the petitioner was thrown to the floor of the wheelhouse and injured.

Hechinger filed a Complaint for Exoneration From or Limitation of Liability pursuant to 46 U.S.C. § 185. At trial, Caskie claimed that the WYNN D II was unseaworthy, and that there had been active and passive negligence by the owner and skipper of the vessel. The District Court held that, because the vessel was safe and seaworthy, and because no negligence existed on the part of Hechinger or Stevenson and the WYNN D II crew, the cause of the accident was an Act of God or peril of the sea.

Petitioner appealed. Among other things, he asserted that the Limitation of Liability Act does not apply to pleasure craft such as the WYNN D II. Hence, he asked the court for an order declaring the Act inapplicable to pleasure craft. He also appealed on the merits.

The Court of Appeals affirmed. *Inter alia,* it held "that the limitation provision applies to pleasure boats, and that the district court had jurisdiction to hear this case." *Id.* at 206. Finding also that the District Court's findings of fact were not clearly erroneous, it affirmed the judgment below.

Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 7, 1990.

SUMMARY OF ARGUMENT

Supreme Court review on writ of certiorari is a matter of judicial discretion. Certiorari will be granted only for special and important reasons.

Under the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, a vessel owner faced with liability for an accident may file a complaint in federal district court for exoneration from, or limitation of liability to the value of the vessel itself at the time of the accident. The court, upon obtaining control of the vessel or the value of the vessel from the vessel owner, may enjoin all claimants from maintaining separate suits and require them to file all of their claims in the limitation proceeding. All matters are then tried to the court to determine whether the vessel owner is liable to any of the claimants and, if so, whether the vessel owner's liability is limited under the Act to the value of the vessel.

Limitation of a vessel owner's liability is only granted in those relatively few cases where the vessel owner can prove that he had no privity with, or knowledge of, the acts or omissions which led to liability.

Since at least 1886, the Act has been interpreted by both this Court, and the *eight* Circuit Courts of Appeal that have considered the issue, as extending the protections of the Act to all types

of craft regardless of whether they be commercial or pleasure vessels. The decisions are thoughtful and well reasoned.

Both the clear wording and the legislative history of the statute make it clear that Congress intended the protections of the Act to be equally available to owners of both commercial and pleasure craft. A pleasure boat exception would require that courts draw lines between "pleasure boating" and "commercial boating" on a case-by-case basis. Encouraging the uncertainties sure to be created by factual hair splitting would constitute bad public policy.

There are therefore no important or compelling reasons for granting Caskie's petition.

ARGUMENT

A. There Are No Special And Important Reasons For Granting This Petition In The Circumstances Of This Case

Review on writ of certiorari is a matter of judicial discretion rather than of right. Certiorari will be granted only for special and important reasons. According to Supreme Court Rule 10:

> .1 A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law

which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

For the following reasons there is no reason for this Court to grant this petition in this case.

1. The Supreme Court And All Circuit Courts Of Appeal Have Construed the Limitation Statute To Apply To Pleasure Vessels

The original Limitation Act of 1851 excluded canal boats, barges, lighters and any vessel used in rivers or inland navigation. Not surprisingly, in 1881 a district court denied any benefit of the act to the owner of a pleasure yacht involved in a collision on the Detroit River. See, *The MAMIE,* 5 Fed. 813 (E.D. Mich., 1881) *aff'd.,* 8 Fed. 367 (1881). Then, in 1886, the act was amended by adding the provisions now found in 46 U.S.C., § 188 making limitation applicable to "all seagoing vessels . . . and all vessels used on lakes or rivers or in inland navigation. . . "

Petitioner would have this Court believe that over the decades there has been confusion and debate as to whether the Act was intended and should be construed to apply to noncommercial vessels. However, that is not in fact the case. From the time of the 1886 amendment until 1984 courts, without exception, applied the Limitation Act to pleasure vessels.

On two occasions during this period, this Court itself considered limitation cases involving pleasure yachts. In *Just v. Chambers,* 312 U.S. 383 (1941) this Court held that the Limitation of Liability Act provided the admiralty court with jurisdiction to martial and determine all claims arising out of a carbon monoxide poisoning incident on a yacht.

Just two years later, in *Coryell v. Phipps,* 317 U.S. 406 (1943), this Court considered claims arising out of an explosion on the yacht SEMINOLE. The lower courts had granted the yacht owner limitation of liability. This Court affirmed and instructed that the limitation statute should be administered *broadly* and *liberally. Id.* at 411.

Very recently, in this Court's last term, in *Sisson v. Ruby*, 110 S.Ct. 2892 (1990), this Court held that the Northern District of Illinois had jurisdiction under General Maritime Law over a vessel owner's limitation complaint arising out of a fire which occurred on a pleasure vessel docked at a Lake Michigan marina.[1]

Since 1886, in addition to the Ninth Circuit, the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh circuits have also applied the Limitation of Liability Act to pleasure vessels.[2] *Many* district court decisions have expressly held that the owner of a pleasure vessel may limit his liability.[3]

In *Complaint of Brown*, 536 F. Supp. 750 (N.D. Ohio 1982) the court noted that:

> . . . Claimant Smith persuasively argues that the application of the Act to the facts in this case leads to an unjust result, and to a perversion of the original purpose of Congress in

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[1] Admittedly, this Court in its Sisson opinion at fn.1 expressly stated that its holding did not address whether the Limitation of Liability Act may act as an independent basis for federal jurisdiction.

[2] See, *Complaint of Interstate Towing Co.*, 717 F.2d 752 (2d Cir. 1983); *Richards v. Blake Builder's Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975); *Warnken v. Moody*, 22 Fed 960 (5th Cir. 1927); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975); *Holloway Concrete Products Co. v. Beltz Beatty, Inc.*, 293 F.2d 474 (5th Cir. 1961); *Petition of H & H Wheel Service*, 219 F.2d 904 (6th Cir. 1955); *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951); *Pritchett v. Kimberling Cone, Inc.*, 568 F.2d 570 (8th Cir. 1977); Petition of *M/V SUNSHINE II*, 808 F.2d 762 (11th Cir. 1987); *Complaint of Keys Jet Ski, Inc.*, 893 F.2d 1225 (11th Cir. 1990).

[3] See, *The TRILLORA II*, 76 F. Supp. 50 (E.D.So.Ct. 1947); *The SPARE TIME II*, 36 F. Supp. 642 (E.D. N.Y. 1941); *In Re Read's Petition*, 224 F. Supp. 241 (S.D. Fla. 1963); *The MISTRAL*, 50 Fed. 957 (W.D.N.Y. 1931); *Petition of Colonial Trust Company*, 124 F. Supp. 73 (D. Conn. 1954); *Petition of Klarman*, 295 F. Supp. 1021 (D. Conn. 1968); *The TRIM TOO*, 39 F. Supp. 271 (D. Mass. 1941); *Complaint of Brown*, 536 F. Supp. 750 (N.D. Ohio 1982); *Petition of Porter*, 272 F. Supp. 282 (S.D. Tex. 1967); *The MURIEL*, 25 Fed. 505 (W.D. Wash. 1928).

> providing for limitation of liability of shipowners. It is not, however, the role of the judiciary to pass upon the wisdom of legislation, *City of New Orleans v. Dukes,* 427 U.S. 297, 96 S. Ct. 2513, 49 L.Ed.2d 511 (1976), nor to set aside a law, or carve an exception to it, simply because the Court considers it to be harsh or draconian . . .

Id. at 752.

Over the years, some courts have expressed dissatisfaction with the concept of limited liability. See, for example, *Complaint of Paradise Holdings, Inc.,* 795 F.2d 756, 763 (9th Cir. 1986).

Nevertheless, as the Fifth Circuit has recognized, if limitation is to be denied to pleasure boat owners, it must be done by Congress.

> [1] At the outset, we acknowledge that contemporary thought, (citations omitted) finds little reason for allowing private owners of pleasure craft to take advantage of the somewhat drastic-for injured claimants-provisions of the Limitation Act. Nevertheless, the cases, as well as Congress, have spoken with a clear voice. And we must heed their words.

Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975)

The Fourth Circuit has expressed the view that the issue of the application of the Limitation Act to pleasure boats was settled by this Court in *Coryell v. Phipps.* See *Richards v. Blake Builder's Supply, Inc.,* 528 F.2d 745 (4th Cir. 1975).

Gilmore and Black, critics of the Limitation Act, also concede that the statute applies to all vessels—both commercial and pleasure until Congress amends the statute to provide otherwise:

> "The Limitation Act covers any sort of "vessel" from a rowboat up and restriction of its coverage to commercial enterprises could be achieved only by amendment."

Gilmore and Black, *The Law of Admiralty,* (2nd Ed., 1975), at 882.

Petitioner has called attention to the fact that during the past six years, at least eight different district courts have held that the

Limitation of Liability Act does not apply to pleasure craft. See, *Petition for Writ of Certiorari* at 13. Although acknowledging that "[o]rdinarily . . . a conflict between the circuit and district courts does not constitute the sort of conflict which prompts this Court to grant review . . .", petitioner has cited secondary authority in support of his position that this Court has considered such conflicts as having relevance in the certiorari context. *Id.* Petitioner misconstrues the doctrine in two important respects.

First, this Court has never suggested that such a conflict alone would justify the granting of certiorari. At most, a conflict among decisions of circuit and district courts has been recognized as a factor tending to show the existence of some other more substantial basis for review, such as the importance of the issue involved. In a typical example where certiorari has been granted, the case involved constitutional questions or fundamental freedoms. See *United States v. Constantine,* 296 U.S. 287 (1935) [liquor tax violated Tenth Amendment to the United States Constitution]; *Heffron v. International Society for Krishna Consc.,* 452 U.S. 640 (1981) [involved First Amendment Rights]; *Bear v. Doe* 432 U.S. 438 (1977) [considered whether Title XIX of the Social Security Act requires states that participate in the Medi-Care program to fund the cost of non-therapeutic abortions]; St. *Martin Lutheran Church v. South Dakota,* 451 U.S. 772 (1981) [considered tax exempt status of religious schools]. Here, the issue presented is simply one of statutory construction—whether or not the protections of the Limitation Act apply to pleasure vessels.

More importantly, it is the Circuit Courts of Appeal which are given the first opportunity to harmonize the law of the federal judiciary. To date, they have fulfilled that obligation by engaging in a thoughtful and considered interpretation of the wording and legislative history of the Act.

All Circuit Courts of Appeal that have considered the issue have given guidance to the courts in their circuits and have held that the Limitation Act applies to pleasure vessels. Of the eight district court cases cited in petitioner's brief, three have been either directly or indirectly overruled. See *Matter of Sisson,* 668 F.Supp 1057 (N.D. Ill. 1987); *Estate of Lewis,* 603 F.Supp. 217

(N.D. Cal. 1987); and *Complaint of Keys Jet Ski, Inc.*, 714 F.Supp. 1057 (S.D. Fla. 1989). Except for *Complaint of Tracey*, 608 F.Supp. 263 (D. Mass. 1985), all of the others fly in the face of the controlling law in their circuits. Simply because an occasional district court may choose to ignore controlling precedent is not enough to warrant that this Court grant this petition to consider the applicability of the Act to pleasure craft when there is no conflict among the circuits on that issue.

2. Rules of Statutory Construction Dictate That Pleasure Vessels Are Included Within The "Any Vessel" Language of the Act

Section 183(a) of the Act provides that:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

The above language states that limitation is available to the owner of "any vessel." The statute doesn't refer to commercial vessels. Yet, the petitioner would apparently have this court construe the word "vessel" in a restrictive way—to define "vessel" to mean "only vessels used for commercial purposes".

As originally enacted in 1851, the Limitation of Liability Act applied only to seagoing vessels. 3 *Benedict on Admiralty*, 1-22. Section 7 of that act provided;

> "This Act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

In 1886, the exclusion was eliminated by an amendment which is now found in 46 U.S.C., § 188. That section reads:

> "Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."

So, since 1886 limitation of liability has been available to owners of all seagoing vessels *and* to owners of *all vessels used on lakes or rivers or in inland navigation.* What could be clearer? Section 183(a) extends limited liability to the owner of "any vessel." Section 188 reinforces the all inclusive nature of the Limitation Act by specifically providing that § 183 applies to "all" vessels. When Congress used the words "any" and "all" it left no room for an argument that pleasure vessels are not covered by the Act. But, there are other grounds just as compelling for concluding that limitation must be applicable to pleasure vessels.

The Limitation Act was further amended in 1936. As will be recalled, § 183(a) limits the vessel owner's liability to "the amount of value or the interest of such owner in such vessel, and the freight then pending." The principal purpose of the 1936 amendments was to increase the limitation fund in certain cases. Section 183(b) provides:

> "(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to any amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts."

Section 183(f), also added in 1936, states:

> "(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders,

> self-propelled lighters, nondescript selfpropelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such terms as used in section 188 of this title."

The purpose of subsection (f) was obviously to exempt the owners of some vessels covered by § 183(a) from the $60 per ton minimum provided in § 183(b). Were a "pleasure yacht" not a "vessel" for purposes of § 183(a), there would have been no need to exclude "pleasure yachts" from the new § 183(b) provisions. A number of courts have reached this conclusion:

> The amount to which liability may be limited is modified in 46 U.S.C. §§ 183(b)-(e) in the case of seagoing vessels where loss of life or bodily injury is involved; however, pleasure yachts are specifically excluded from the operation of §§ 183(b)-(e), but not from § 183(a), by §§ 183(f). Since, if a pleasure yacht were not a vessel, and hence excluded from the operation of 183(a), it would be unnecessary to exclude it from §§ 183(b)-(e), it is obvious that a pleasure yacht is a vessel for purposes of § 183(a).
>
> *Complaint of Brown,* supra at 752.

> The express exclusion in Section 183(f) of pleasure yachts from the term seagoing vessel as used in subsections (b), (c), (d), and (e) of Section 183, fairly implies that pleasure crafts were intended to be included in Section 183(a) the only provision of the statute hereby applicable.
>
> *Petition of Klarman*, 295 F. Supp. 1021, 1022 (D. Conn. 1968); see also, *Otto v. Alper*, 489 F. Supp. 953 (D. Del. 1980).

There were at least five reported cases between the 1886 amendments and those of 1936 in which the Limitation of Liability Act was applied to pleasure vessels.[4] Not one case during

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[4] See *Warnken v. Moody*, 22 F.2d 960 (5th Cir. 1927); *The MISTRAL*, 50 F.2d 957 (W.D.N.Y. 1931); *LUVINA*, 1927 AMC 327 (S.D.N.Y. 1927); *The MURIEL*, 25 F.2d 505 (W.D. Wash. 1928); *The ALOLA*, 228 Fed. 1006 (E.D. Va. 1915).

that period denied that the protections of the Act were available to pleasure boat owners. As of 1936 the nature of a vessel's use or employment was irrelevant to the issue of whether its owner could limit his liability.

We can presume that in 1936 Congress knew that federal courts were construing § 183(a) as applicable to pleasure yachts. If Congress didn't intend for the Limitation Act to apply to pleasure yachts, the 1936 amendments were the time to say so. See, *Air Transport, Etc. v. Profess Air Traffic, Etc.*, 667 F.2d 316, 321 (2nd Cir. 1981). Instead, Congress did just the opposite. In § 183(f) it made sure that limitation remained available for pleasure yachts without subjecting them to the $60 per ton provisions of § 183(b).

While the statute is clear it is helpful to point out a material part of Senate Report No. 2061 on *Limitation of Shipowners' Liability, May 12, 1936*, 74th Congress, 2d Session (Calendar No. 2165) which states:

> The proposed subsection (f) of section 4283 [§ 183, 43a-44a] excludes from the provisions of subsections (b), (c), (d), and (e), pleasure yachts, . . . nondescript self-propelled vessels . . . [and other vessels], even though they may be seagoing vessels within the meaning of section 4289 of the Revised Statutes [§ 188, 46a]; . . . The proposed subsections (b), (c), (d), and (e) of section 4283 are made to apply only to seagoing vessels, but it was the opinion of the committee that even though the above-described vessels should be seagoing vessels, they should be exempted from the operation of the $60-per-ton minimum liability and left under subsection (a) of section 4283, i.e., the old law. It is not intended by the proposed subsection (f) to change in any way, by implication or otherwise, the meaning of the term "seagoing vessels", or the term "vessels used on lakes or rivers or in inland navigation", as used in section 4289, but only to limit the meaning of the term "seagoing vessels" for the purposes of the $60-per-ton minimum liability, and the provisions relating thereto.
>
> *Id.* at 5, emphasis added.

The foregoing language clearly demonstrates the intent of Congress that pleasure yachts and nondescript self-propelled vessels should be included in § 183(a).

Most importantly, 1 U.S.C. § 3 indicates that it is not for this Court to define the word "vessel". Congress has already done so in 1 U.S.C. § 3. It reads:

> "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

According to § 3, then, *every* description of watercraft qualifies as a vessel. There is no requirement of a commercial purpose or use. This Court has held that a yacht or pleasure craft is a vessel under 1 U.S.C. § 3. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, (1982). See also *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974) and *Complaint of Brown*, supra. Neither can it be denied that 1 U.S.C. § 3 should be used to define the word "vessel" as that word is used in 46 U.S.C. § 183(a). In *Evansville & B.G. Packet Co. v. Chevo Cola Bottling Co.*, 271 U.S. 79 (1926), this Court did just that. *Id.* at 80.

Recently, in *Foremost Insurance Co. v. Richardson*, supra, this Court said:

> . . . Congress defines the term 'vessel,' for the purpose of determining the scope of various shipping and maritime transportation laws, to include all types of waterborne vessels, without regard to whether they engage in commercial activity. *See, e.g.*, 1 U.S.C. § 3 [1 USCS § 3] (" 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water").

Id. at 676.

3. Logic, Public Policy and Basic Fairness Require That Pleasure Vessels Be Given The Benefit of Limitation of Liability

Neither logic nor public policy supports a practice of allowing "commercial" interests to limit liability while denying that right to pleasure and recreational boat owners.

In the first place, carving out a pleasure boat exception would require that a line be drawn between "pleasure boating" and "commercial boating." In *Foremost Insurance Co. v. Richardson*, supra, this Court rejected such a distinction because of the uncertainties sure to be created:

> Yet, under the strict commercial rule proffered by petitioners, the status of the boats as "pleasure" boats, as opposed to "commercial" boats, would control the existence of admiralty jurisdiction. Application of this rule, however, leads to inconsistent findings or denials of admiralty jurisdiction similar to those found fatal to the locality rule in Executive Jet. Under the commercial rule, fortuitous circumstances such as whether the boat was, or had ever been rented, or whether it had ever been used for commercial fishing, control the existence of federal-court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities.

Id. at 676.

Just last term, in *Sisson v. Ruby, supra*, this Court again declined to draw a distinction between "pleasure boating" and "commercial boating" in defining the limits of admiralty jurisdiction:

> Although . . . protecting commercial shipping is at the heart of admiralty jurisdiction, we also note that interest
>
> > 'cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. This interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the

> potential effect of noncommercial maritime activity on maritime commerce . . . '

Id. at ____ citing *Foremost Insurance Co. v. Richardson, supra,* at 674-675.

Is a yacht with a paid, professional master and crew a pleasure vessel or a commercial vessel? Is a yacht chartered to a friend for an agreed consideration a pleasure or a commercial vessel? How would you classify a yacht owned by a business corporation and used for corporate public relations purposes? What of a sightseeing boat carrying passengers for hire?

Creating a pleasure boat exception would also constitute bad public policy. Presumably, a vessel carrying passengers for hire would be a commercial vessel, no matter how large or small the vessel. The owner of such a vessel—one who charged a fee for providing transportation—could limit his liability; yet the generous host who gave a friend a ride in his yacht could not. And the commercial operator is the one which is more likely, due to regulations and financing agreements, to carry substantial liability insurance. The small boat owner, who would, under petitioner's theory, not have the protection of the Act, would be more likely to be uninsured or have low insurance limits.

There is another reason why it would be poor policy to effect piecemeal charges in the Maritime Law relating to pleasure vessels. The Maritime Law is a complex corpus of rules, concepts and legal practices which are interdependent. No one rule, concept or practice should be changed without careful consideration of the effect that change will have on other rules, concepts and practices in the corpus.

CONCLUSION

For the reasons discussed above, Caskie's Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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